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Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 139.

THE ST. PAUL & SIOUX CITY RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY,
Defendant in Error.

Brief of E. C. PALMER,
Counsel for Plaintiff in Error.

ST. PAUL:
H. M. SMYTH PRINTING CO.
1884.

SUPREME COURT

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No. 139.

THE ST. PAUL & SIOUX CITY RAILROAD COMPANY,
Plaintiffs in Error,
against
THE WINONA & ST. PETER RAILROAD COMPANY,
Defendant in Error.

STATEMENT OF THE CASE.

This action was brought by the Winona and St. Peter Railroad Company to determine the question of title to real estate, and to obtain a transfer of the title, held by the State of Minnesota, to the plaintiff. The complaint set up the facts relied on to establish plaintiff's equitable title, alleged a transfer from the United States to the State for the benefit of the St. Paul and

Sioux City Railroad Company, and a threatened conveyance by the State to the latter company of the title, and prayed for an injunction restraining that company from applying for or receiving such conveyance, and for a general decree in the action.

Among the material allegations are those relating to the Acts of Congress, of the Territory and State of Minnesota, the proceedings and failure of the old land grant companies, the foreclosure of the mortgages, and the resumption of the grants and franchises and the transfer to the present companies. Also the location of the roads, the construction thereof, the quantity of land available to the grant, the fact and extent of the deficiency, and the action of the General Land Department of the United States in the adjustment of the grant and the certification of the lands to the State for the benefit of the respective roads. The action was the first commenced between the two companies relative to the lands granted to the State to aid in the building of the two lines of road, and followed a contest upon the same subject which had just ended before the Secretary of the Interior in favor of the defendant company.

The plaintiff below rested its claim of title to the lands in controversy upon the Act of Congress of March 3, 1857, and the act of March 3, 1865.

The defendant below claimed under the same act of March 3, 1857, and the seventh section of the act of May 12, 1864.

These acts are as follows:

AN ACT MAKING A GRANT OF LAND TO THE TERRITORY OF MINNESOTA, IN ALTERNATE SECTIONS TO AID IN THE CONSTRUCTION OF CERTAIN RAILROADS IN SAID TERRITORY, AND GRANTING PUBLIC LANDS, IN ALTERNATE SECTIONS, TO THE STATE OF ALABAMA TO AID IN THE CONSTRUCTION OF A CERTAIN RAILROAD IN SAID STATE.—(*Statutes at Large, Vol. 11, Ch. 99, p. 196.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch *via* Saint Cloud and Crow Wing to the navigable waters of the Red River of the North at such point as the Legislature of said Territory may determine; from Saint Paul and from Saint Anthony *via* Minneapolis to a convenient point of junction west of the Mississippi, to the southern boundary of the Territory, in the direction of the mouth of the Big Sioux River, with a branch *via* Faribault to the north line of the State of Iowa west of range sixteen; from Winona *via* St. Peter, to a point on the Big Sioux River south of the forty-fifth parallel of north latitude; also from La Crescent, *via* Target Lake, up the valley of Root River, to a point of junction with the last mentioned road, east of range seventeen; every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the Governor of said

Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid and appropriated as aforesaid,) shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid; *Provided*, That the land to be so located shall, in no case, be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches; *Provided further*, That the lands hereby granted for and on account of said roads and branches severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever; *And provided further*, That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through such reserved lands, in which case the rights of way only shall be granted, subject to the approval of the President of the United States.

"Sec. 2. *And be it further enacted*, That the sections and parts of sections of land which by such grant shall remain to the United States, within six miles on each side of said roads and branches, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry, until the same shall have been first offered at public sale at the increased price.

"Sec. 3. *And be it further enacted*, That the said lands hereby granted to said Territory or future State shall be subject to the future disposal of the Legislature thereof for the purposes herein expressed, and no other; and the said railroads and branches shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

Sec. 4. *And be it further enacted*. That the lands hereby granted to said Territory or future State shall be disposed of by said Territory or future State only in the manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches may be sold; and when the Governor of said Territory or future State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads and branches having twenty continuous miles completed, as aforesaid, and included within a continuous length of twenty miles of each of such roads or branches, may be sold; and so from time to time until said roads and branches are completed; and if any of said roads or branches is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States.

Sec. 5. *And be it further enacted*, That the United States mail shall be transported over said roads tions, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State," approved March third, eighteen hundred and fifty-seven, shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts, and as hereinafter provided.

Sec. 2. *And be it further enacted*, That the first proviso in the first section of the act aforesaid shall be so amended as to read as follows, to wit: *provided*, that the land to be so located shall in no case be further than twenty miles from the lines of said roads and branches, to aid in the construction of each of which said grant is made; and said lands granted shall, in all cases, be indicated by the Secretary of the Interior.

Sec. 3. *And be it further enacted*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby reserved and excepted from the operations of this act, except so far as may be found necessary to locate the route of said road through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States; *provided further*, that any lands which may have been granted to the Territory or State of Minnesota, for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted, and that any lands which may have been so granted shall be strictly applied in accordance with the terms and conditions of said act or acts, unless subsequently modified by law.

Sec. 4. *And be it further enacted*, That the sections and parts of sections of land, which by said acts and this grant shall remain to the United States, within ten miles on each side of said roads and branches, shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the mininum price as aforesaid; *provided*, that actual *bona fide* settlers under the preemption laws of the United States, may, after the proof of settlement, improvement and occupation, as now provided by law, purchase the same at the increased minimum price; *and provided, also*, that settlers under the provisions of the homestead law, who comply with the terms and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

Sec. 5 *And be it further enacted*, That the lands hereby granted shall be subject to the disposal of the Legislature of the State of Minnesota, for the purposes aforesaid, and no other. And the said railroads and branches shall be and remain public highways for the use of the Government of the United States, free of all toll or other charges upon the transportation of any property or troops of the United States.

Sec. 6. *And be it further enacted*, That the lands hereby and heretofore granted to the said Territory or State of Minnesota shall be disposed of by said State for the purposes aforesaid only, and in manner following, namely: When the Governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of said road is completed in a good, substantial and workmanlike manner, as a first-class railroad, and the said Secretary shall be satisfied that the said State has complied in good faith with this requirement, the said Secretary of the Interior shall issue to said State, patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situated opposite to and within a limit of twenty miles of the line of said section of road thus completed, extending along the whole length of said completed section of ten miles of road, and no further. And when the Governor of said State shall certify to the Secretary of the Interior, and the Secretary shall be satisfied that another section of said road, ten consecutive miles in extent, connecting with the preceding section, or with some other first-class railroad, which may be at the time in successful operation, is completed as aforesaid, the said Secretary of the Interior shall issue to the said State, patents for all the lands granted and situated opposite to and within the limits of twenty miles of the line of said completed section of road or roads, and extending the length of said section, and no further, not exceeding ten sections of land per mile for all that part of said road thus completed under the provisions of this act, and the act to which this is an amendment, and so, from time to time, until said roads and branches are completed. And when the Governor of said State shall so certify, and the Secretary of the Interior shall be satisfied that the whole of any one of said roads and branches is completed in a good, substantial and workmanlike manner, as a first-class railroad, the said Secretary of the Interior shall issue to the said State, patents to all the remaining lands granted for and on account of said completed road and branches in this act, situated within the said limits of twenty miles from the line thereof, throughout the entire length of said road and branches; *provided*, that no land shall be granted or conveyed to said State under the provisions of this act on account of the construction of any railroad or part thereof, that has been constructed under the provisions of any other act at the date of the passage of this act, and adopted as a part of the line of railroad provided for in this act; *and provided*, that nothing herein contained shall interfere with any existing rights acquired under any law of Congress heretofore enacted, making grants of land to the State of Minnesota to aid in the construction of railroads; *and provided further*, that said lands, granted by this or prior acts, shall not in any manner be disposed of, except as the same are patented under the provisions of this act; and should the State fail to complete any one of said roads or branches within eight years after the passage of this act, then the said lands undisposed of as aforesaid, granted on account of said road or branches, shall revert the United States.

Sec. 7. *And be it further enacted*, That as soon as the Governor of the said State of Minnesota shall file, or cause to be filed, with the Secretary of the Interior, maps designating the routes ofsaid roads and branches, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

Sec. 8. *And be it further enacted*, That the United States mail shall be transported on said road, under the direction of the post office department, at such price as Congress may by law provide; *provided*. that until such price is fixed by law, the Postmaster General shall have power to fix the rate of compensation.

Sec. 9. *And be it further enacted*, That the provisions of this act shall also be construed so as to apply and extend to that portion of the line authorized to be vacated by the joint resolution, approved July twelfth, eighteen hundred and sixty-two, entitled a joint resolution authorizing the State of Minnesota to change the line of certain branch railroads in said State, and for other purposes, notwithstanding the vacation thereof by said State, as though said joint resolution had not passed, and also to the line adopted by said State, in lieu of the portion of the line so vacated.

Sec. 10. *And be it further enacted*, That the time mentioned in an act entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of the railroads in said State," for the completion of certain railroads named in said act, be, and the same is hereby extended two years.

Sec. 11. *And be it further enacted*, That the last clause of the second section of an act entitled, "An act to regulate the compensation of registers and receivers of the land offices in the several States and Territories in the location of lands by States and corporations under general grants from Congress, and for other purposes," be, and the same is hereby so amended as to read: "A map of the change shall be filed with the commissioner of the General Land Office within three months after the said change of location shall be made."

Approved March 3, 1865.

Certain facts were admitted and found on the trial below, which it is important should be borne in mind, to-wit: That there was a deficiency of lands as to each road under the act of March 3, 1857; and, as to the plaintiff, under the act of March 3, 1865; and, as to defendant, under the act of May 12, 1864; and the deficiency was large enough in each case to absorb all the lands available for indemnity purposes, and still leave a shortage under the grants. Record, p. 53, 100 The defendant located its line through the territory where the lands in controversy lie in 1859, the plaintiff in 1868. Record, 91, 93-4, 148.

No specific designation or selection of indemnity lands was made by either party until 1872, and then such lands were first selected by defendant. Record, 103, 148.

The intersection or crossing of the two routes had been made at St. Peter, the point designated in the act of March 3d, 1857, and also in the act of the State of Minnesota, approved May 22, 1857, and the land falling within the conflicting limits had been divided according to the rule of moieties. Record, 102.

The Secretary of the Interior upon a contest between the parties, awarded all the lands in controversy to the defendant below, and certified them to the State for the benefit of defendant's line of road. Record, 103–104.

The location of plaintiff's route producing this conflict and contest, was voluntary, intentional and unnecessary, and was in great part abandoned when the road was built. Record, map and act of 1857.

ASSIGNMENT OF ERRORS.

I.

The court below erred in holding that under the act of March 3, 1857, priority of location did not confer priority of right as to lands falling within the designated limits of the line thus located.

II.

The court below erred in holding that the act of May 12, 1864, was not a *grant* to a road previously located, and did not give priority to the defendant below as to all lands falling within its scope, which had not been previously attached by location to plaintiff's route under the act of March 3, 1857.

III.

The court erred in holding that the act of March 3, 1865, only applied to the location of lands appropriated under that act, and did not in any respect affect the provisions of the act of March 3, 1857, which could still be carried out independently, as if the former act had not been passed.

IV.

The court erred in holding that the lands in controversy lying west of range 37 became specifically attached to plaintiff's line by its location *to* range 37, and therefore did not fall within the operation of the act of May 12, 1864.

V.

The court erred in holding that the doctrine of relation applied to a location, so as to make the initial step of the survey, the date of location, instead of the date of the date of the adoption of the route and the filing of a map by the proper officers.

ARGUMENT.

I.

a.

A fair construction of the act of March 3, 1857, will show that, although there was a point of intersection named at or near St. Peter, and hence a necessary conflict, it was intended that each road should have and dispose of its lands in severalty by twenty-mile divisions immediately upon location of the route, and in advance of construction. Each road had this right for itself, independent of any other. Section four provides, that the lands granted shall be disposed of in a particular manner, and in that manner only. One hundred and twenty sections, included within a continuous length of twenty miles, may be sold at once upon location; and upon completion of twenty miles of road and due certification thereof by the Governor, another 120 sections could be sold, and so on till all were sold.

It is obvious that these mandatory provisions could not be complied with except upon the principle that priority of location gave priority of right to specific sections of land lying along a continuous length of twenty miles of the located line; that the title to the land thus set apart and disposable to inaugurate the construction of the road, was a perfect one, and not liable to be impaired by the subsequent act of a rival line; that the title was not of an undivided moiety of said 120 sections, or some of them, but a title absolute, embracing each section in severalty, and marketable as such.

This is true of the whole grant as fixed in its application to specific sections of land by the location of the whole line.

Sale precedes construction, and upon completion of the whole line all the lands have been disposed of in the only mode permitted by the grant.

It is pertinent to ask, in a case where all the lands have been disposed of in strict conformity to the provisions of section 4, what title the purchasers have acquired to their lands, if years subsequently some other railroad company lifting itself out of its antecedent inertia, can proceed to locate its line in conflict with the other, and claim and obtain one-half of each of the 120 sections previously sold. None at all; and the *imperative* provision of the grant is violated, which expressly appropriates each division of 120 sections, or the proceeds thereof, to aid in the construction of the road for which they were granted. We insist that such result has no support in equity or in any proper construction of the terms of the grant.

Equity always favors the diligent—never the laggard.

Vigilantibus non dormientibus servit lex.

The grant should not receive a construction which will abrogate the rule of equity, or disregard the provisions above referred to in section four.

To sell requires designation of the specific lands

—every parcel. The title must be perfect *at date of sale*. Undivided interests in real estate are not usually saleable; at least, not as saleable nor as valuable, even when the specific parcels are known, as a title in severalty. These advance sections were intended as present aid. They were just the number and the whole number comprised within each twenty-mile division of located road, if none had been preempted or disposed of by the United States.

That quantity of land, if found on location of the route, and if not found, then all there was, Congress intended the road should have, as available aid to start the enterprise. But if another line on a later location could take or recover half of it, then the first road would get only one-half the granted quantity and thus the grant would be emasculated to that extent and the plain intent of Congress violated.

It may be admitted that the lines or routes of these two roads must cross, were required to cross by the terms of the act, and that therefore there would arise a conflict of limits, or "overlapping limits," embracing lands common to both roads so far as location is concerned. But we submit that this *necessary* conflict of limits, does not of itself put the two roads on an equality as to the specific lands lying about the point of intersection.

1. No express language to that effect is found in the act. The grant is indeterminate, describes no land, gives no courses or distances except in the most vague and

general manner, and does not attempt to define the rights of the roads as between themselves.

2. It expressly leaves to each beneficiary the office of carrying the grant into effect, of making it determinate and applicable to specific lands for the benefit of the actor, each for himself. Location of one line only gives precision to lands thereby attached to that line, not to any other. Selection of lands outside the granted lands, has the same effect, no more no less.

3. If Congress had intended to grant undivided moieties in respect to lands in conflict, or brought into conflict by location, appropriate language would have been used to disclose that intention. And common prudence as well as justice would have required a more specific designation of the point of intersection, than can be found in the act of March 3, 1857. And the lands lying about each point of intersection would have been excepted from the quantity (120 sections) allowed to be sold in advance of construction, so that the rest of the grant could be made available in aid of the enterprise in the manner and at the times specified in section four. But as the act is framed, no purchaser could be safe in the purchase of a single acre if the rule held by the court below be sound. He would run the risk of division with a road, which might be so located as to cause a conflict at any time there after within the life of the grant. Congress cannot be supposed to say one thing and mean another, to

authorize 120 sections to be sold, and mean only an undivided interest in that number. Where is the doctrine found which justifies such a construction of public or private grants?

4. There is, we submit, no rule of construction applicable to public or private grants, which will defeat the purpose of the grant, or so emasculate its value as to make it practically unavailable.

On the contrary, effect must be given, if possible, to the whole act, and each and every of its provisions, especially those which are clear, positive and mandatory in their terms, and were inserted in aid of the main purpose of the grant.

In the act of March 3, 1857, it is provided "that the lands hereby granted, for and on account of said roads and branches, *severally, shall be exclusively applied in the construction of that road, for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever.*"

This is a several grant to each road, of land made specific by location, which land thus segregated from the public domain by location, becomes exclusively devoted to the construction of that line, and can "be applied to no other purpose whatever." If language has any meaning, here is a several, not a joint grant, a grant to one road of certain sections of land lying in place, as indicated or fixed by the definite location of that line, and made disposable as soon as ascertained; not a grant to two roads of undivided interests in the whole grant, or in any separate part or parts thereof. Each road is left to locate its own line and thereby disentangle its own lands. And *then* 120 sections can be sold, a good title given, and construction begin. Not a word in the act indicates community of interest, joint tenancy or tenancy in common. The provisions of section four cannot be made effectual, if any part of the grant is liable to be depleted by the action of a hostile road at an indefinite time in the future.

The only reason or ground for the rule of undivided moieties as to any part of the grant, is found in the fact that by the course or direction of the different lines, a *point of intersection is made necessary*, and therefore, as to the lands lying about that point, there must be a division on some basis, and the rule of undivided moieties has been adopted as the easiest of adjustment, in order to effectuate the supposed intent of the grantor.

The strength of this argument, so far as has any, rests solely on the fact that Congress, *in compelling a crossing of two routes* under a grant of even date, must have intended to treat each grantee alike, and give to each an equal share of the public domain in aid of each enterprise. It is, hence, a question of intention. This view would be strong, if there were no other provisions in the act which must be taken to qualify the fact of a necessary conflict. And it will be noticed that the doctrine of relation applied solely in the interest of the last locator cuts an indispensible figure in making the rule of moieties effectual.

But in the same grant, which produces the conflict, are found provisions essential to effectuate the purpose of the grantor which cannot be followed or made operative, if a joint interest is evolved out of the clause producing the conflict.

These provisions are as mandatory as language can make them.

They control and dominate all action under the grant and are the key to its proper construction. They were designed to inaugurate the enterprise in each instance, each road by itslf, for itself, regardless of the condition or forwardness of any other. No other road may have a located line; it may be wholly inert—dead. Yet the live road, its line located, its lands secured, goes on, takes possession, and sells 120 sections in advance of construction, and after building 20 miles, sells another 120 sections, and so on until all its lands are sold, and its whole line built and put in operation.

Here we have a case where title and occupancy concur, for the right to sell carries with it the possession, where each line is split into twenty mile divisions, and title restricted to each division in order of construction, and yet it is urged that Congress intended to give another line a right to intervene at any subsequent time within the life of its grant, and take half the lands and an equal right of occupancy.

Though dead during all the prior period, there may be a resurrection. And so, all at once, years after the diligent road has been built, its lands sold, villages and cities established thereon, and the whole region settled and improved, the comatose road revives, locates its line with its *necessary crossings*, right through the heart of some prosperous city, and lays claim to an undivided half of the original lands.

Does it not occur to every fair mind that such a claim has no merit, and ought to have no foundation in grant unless such result is compelled by clear and unmistakable language? Yet this is the inevitable result in all these cases upon the theory that a necessary conflict gives each party to the conflict, precisely identical rights and interests in the lands, regardless of the time when such conflict is in fact produced.

If there were four roads which by the terms of the grant must intersect somewhere in a region of country 200 miles square, and one road should be located and built with the proceeds of the lands sold as required in section four within five years, a second road might wait five years longer, and then intersect and take half the lands. The third road might wait longer and then claim one third; and the last road still longer and claim one-fourth. What a condition of things!

How can this view be reconciled with the language of the grant, which confines title in the first instance, to a designated quantity of land lying in a region of country bounded by the lines of location and lines parallel thereto, but which may be taken possession of and sold *immediately upon location*, for the exclusive benefit of the road making the location? This quantity of land is locatable on any twenty-mile division though such division may cover the point of intersection with another road named in the grant.

Courtright v. Railroad Co., 21 Wall. 310.

These advance sections comprise the exact maximum quantity of land which can be found "*in place*" within a continuous length of twenty miles, under a six section grant. No more can be sold until twenty miles of road are actually built, for no title exists as to any greater quantity; and then exactly the same quantity may be sold. Did not Congress intend to do just what the act provides may be done, and for the sole benefit of said party which first begins operations?

Farnsworth v. Railroad Co., 2 Otto, 49.
Rice v. Railroad Co., 1 Black. 360.

b.

Priority of location gives priority of right (if not in cases of necessary conflict) in all cases where a conflict is produced by the mere voluntary, intentional or wanton act of the party making the junior location.

The sole reason urged against the rule, that priority of location gives priority of right, is, as we have seen, that the grant *requires* an intersection of different lines of road, and therefore, the intention was to give the beneficiaries an equal portion of the granted lands, which may be found to lie about the lines of intersection. And there is no authority or dictum in conflict with the doctrine of priority which does not rest upon this implied intent as controling.

We do not admit the force or soundness of the position nor the justice of the rule in this case, or in cases where, under the granting act, the point of intersection is indefinite, or left to the option of the company making the last location, within a range of 30 or 40 miles along the completed road.

But whatever may be the rule in such cases—where the lines *must cross*—thus making a *conflict necessary by the very terms of the grant*, the reason utterly fails when applied to a case of unnecessary conflict—a case where the routes need not cross, or run so near as to produce a conflict—which is this case, so far as the lands in controversy are concerned. This is even more than a case of unnesessary conflict. The record shows the conflict to be selfish, wanton and wholly unjustifiable, *produced by a search after coal fields*, at a point far removed from the proper and natural path of the plaintiff's road towards its western terminus. And this, too, long after the defendant's road had been located, and worse than all, long after the point of the crossing of the two routes contemplated by the act, had been established; and the lands thus brought into conflict, had been, by force of such intersecting locations, designated and divided under the rule of moieties, then held applicable in such cases.

The general courses of the two lines are so given in the act of 1857, as probably to make a crossing necessary somewhere. But taking that act, which names St. Peter as a point through which plaintiff's road must pass, in connection with the act of the Legislature of Minnesota conferring the grant on defendant, which also mentions St. Peter for that road, makes it evident that the two roads must cross at St. Peter. Thus we may admit that by force of the two acts one crossing is made necessary at a point designated. We do not think that the State act can be referred to as pertinent on the question of the intent of Congress, as disclosed in the act of 1857, but we do not care to make that issue here. We say, that admitting Congress intended to compel *one* crossing, and so cause *one* conflict of lines, it does not follow that any *other* crossing or conflict was required, or permitted or supposed to be practically possible. On the contrary we confidently insist that the very fact that one conflict was in terms made necessary by the act, proves that no other was intended or permissible.

Expressio unius est exclusio alterius.

The necessity imposed by the act, is the only basis for the claim that a joint interest was intended. If the routes were so limited in the grant that they could not cross, or should not or need not cross, then clearly it could not be fairly argued that Congress intended any community of interest, even though section four had been wholly omitted. As a question of intention there could be no doubt. Because if the grant does not relate to the same common territory so as to produce a conflict of interest in the thing granted, there can be no occasion or room for construction as to what the act means. Each party would take its lands in severalty, and no dispute could arise. So where one intersection is made necessary by the terms of the grant, if the first locator is content to allow the latter one to take half the land thus necessarily brought into conflict, no question could arise as to the meaning of the act. But after such division had been allowed, should the last locator claim the right, as in this case, to a produce a second, third or fourth conflict, by his own act of location, we think such claim could not find support in any theory properly inferible from the act.

As a question of intention there can be no doubt in such a case. Congress did not intend to confer power upon the laggard locator to produce conflicts at will, and thereby interfere and diminish the lands of the diligent locator. To compel a conflict by express terms is one thing, to authorize and empower a party to make conflicts at will is quite another. Indeed, if the act had expressly declared that one party might, at any time after another line had been located, and its lands sold in designated quantities, run across or alongside that line at will, and thereby become entitled to one-half the lands so brought into conflict, it would have been a monstrous perversion of legislative power, and a court of equity would be eager to find some ground for holding the act inoperative in that respect. Yet that is just this case.

The trial court found as matter of fact as follows:

"*The abrupt southerly deflection of the line commencing at the west side of range 31 (plaintiff's line) was made without direct reference to the proposed terminal point of the road, but for the purpose of reaching coal fields then supposed to be in existence and to be located in township 108, range 35, near to this surveyed line.*" Record folio 274.

And it is this interference produced by the "abrupt deflection" towards the defendant's prior location, which this court is asked to hold, as the court below did, Congress intended as the natural and probable result of the passage of the act of 1857.

But how does this power of interference, this right of intrusion, this capacity to coil around the prior line like a snake around its victim, consist with the provisions of section four? Can they stand together and be made effectual as to the whole grant? Is there any such right, as that claimed here by the defendant in error? We insist there is not. Its existence and insertion, had it been put in plain terms, would imperil and practically destroy the value and extent of the benefaction to the road first located. Indeed, instead of hastening location and construction, such a rule would retard both; for the road last located would have a decided advantage, and the struggle would be, not which should be first, but which should be last, located. The road first located would not know what lands it would finally get, while the last one would know upon location, if not before, just what lands and how many it would get, since it could lay its course to the best advantage and rely on the doctrine of relation to make its title co-date the other.

The evils and difficulties attending the rule of moieties, in case the grant specifies the point of intersection, and thus makes it compulsory, are greatly intensified in a case like this. Not one twenty-mile division, but the whole line is involved; all the divisions, indemnity lands as well as lands "in place." Not an acre is secure, not an acre can be sold with a perfect title by the road first located. Location of route, selection of division, certification by the Land Department, conveyance by the State of the specific trust property granted, all may be rendered null, as a moiety of each acre described could be subsequently taken at the mere will or caprice of the dilatory party, and without limitations as to time except by the life of the grant.

If it be said that there is no restriction upon intersection expressed in the act; that it is not unlawful to produce a conflict, and when one is in fact made, all the consequences follow which attend a necessary conflict, we reply that it is true there is no express inhibition, neither is there an express requirement except as to a single point. But this very designation of a specific intersection shows that no other was intended.

Expressio unius est exclusio alterius. State v. Railroad Co., 21 Minn. 315.

To this is added the unmistakable significance of section four, which, as we have seen, cannot have any practical operation as to time and quantity, if voluntary conflicts can come in and maintain a claim to lands or proceeds.

c.

The doctrine of relation (a justifiable fiction in some cases) should not apply here.

An act or grant which confers full disposing power on the beneficiary as to a definite quantity of land ascertainable by himself, acting alone and for himself, necessarily invests him with a perfect title, and leaves no room for the application of the doctrine of relation. A claim of title founded on a subsequent act of the party is not an *intervening* or *interfering* claim in the sense that term is used in this class of cases, and affords no basis for a resort to the legal fiction of "relation." Authority to sell at a given time, carries with it the ability to make a clear title *at that time.* Carrying back that title to the date of the grant, as to such lands, in order to give a supine grantee a right to get half the lands, if he should elect to do so, would render null the antecedent proceedings, the quantity of lands falling under the power, and defeat the main purpose of the grantor in making the grant. It is a novel use of the fiction of relation to allow it to be *held in leash* by a cunning and indolent party, to be loosed at will upon game which has been bagged and eaten and digested years before.

The real question is one of intention. And there is no room for construction in the face of a clear express declaration of the legislative will.

When it is declared that one hundred and twenty sections may be sold immediately upon location, in advance of construction, and the proceeds applied solely in aid of that line of road, it must be intended that the investiture of title to *that* land is then complete—is subject to no diminution or diversion.

If the diligent road cannot sell 120 sections at once upon location, if *at that time* it has no title to said sections or any one of them in severalty, of what force or effect, is section four?

If 120 sections may be sold as the act declares, what becomes of the moiety rule?

There is no provision for a joint sale. There is no provision for co-operative or joint action of any sort. There is no provision compelling co-incident location. Each road is regarded as a seperate grantee; each acts for itself in its own interest, from the running of the first experimental line, to the driving of the last spike.

So we say, that taking the whole act together, considering all its provisions, and the main purpose to be accomplished by the grant, there is no ground for evolving the rule of moieties, or calling in the *ex post facto* aid of the fiction of relation, in order to punish the diligent and reward the sluggard, and cripple if not render worthless the Congressional benefaction. Especially is this true in a case where the doctrine of relation, is invoked to give effect to an improper and malicious if not positively forbidden act.

No rule of construction should be adopted which will invite aggression, or make marauders of grantees in this class of cases. If the fiction of relation is held to be applicable to cases of voluntary conflicts, the effect will be, to make such conflicts numerous, for the longer a road waits, the more valuable will become the lands secured by the prompt action of the other road, and the greater will be the incentive to run up alongside and across, as often as possible, so as to get as much value from a moiety as would have been obtained from double the quantity, taken beyond and outside the chance of conflict. But when the grant requires the grantees to do some act to give precision to the thing granted, not by concerted or joint action, but alone, each for itself, and then when one has acted, gives that party thereupon full disposing power over the thing or things disentangled from the general grant, it is evident that there is no scope or necessity for the use of the fiction of relation.

The thing is done; ambiguity is removed; investiture is complete; title is perfect; sale may be made, and the entire benefaction to that party may be secured, disposed of, and the proceeds have performed their functions before the other party has commenced to do the things required. To ante date such late proceedings through the aid of relation, is rank communism.

Equality is not equity, where the thing coveted has been earned by the zeal, activity and enterprise of one of the parties.

The man who has gathered a little property by years of hard labor, ought not to be compelled to share it with some lazy vagabond, who has never done any work in his life, except to put out his hand and seize his neighbor's goods.

The right to sell and enjoy the proceeds of 120 sections is earned by that road, which first puts itself in a legal position to demand them. As against the United States, the grant may take effect as of its date, except as otherwise expressly provided in the act. But this is because words of present grant are used, and whatever is done to make the grant specific or effectual as to the grantor, has a direct relation to its inception, and becomes part and parcel of the original act.

The doctrine or fiction of relation is thus defined· "Where there are various acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this all other acts shall have relation." Viner's Abr., Title, Relation, E.

"All the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."

Cruise Dig., vol. 5, p. 510-11.

What is "the substantial part" in this class of cases now under consideration?

The grant itself is indeterminate—a "float"—not attaching to specific lands, nor even to a specific belt of land, described with reasonable or common certainty.

The title, legal and equitable, with full power of disposition of and to all the lands, is retained by the grantor until location of the road.

The act requires acceptance by the grantee, before it can have force or vitality, even in a general sense.

The route or line of road must be definitely fixed, before any claim whatever to specific lands can be set up on behalf of the grantee. And after all this, no absolute title to these lands can be acquired, except as to 120 sections, until certain conditions are complied with, among which is the construction of the road.

Now, when the title to specific sections or tracts of land comes in question between private parties, each claiming to have performed all that was necessary to secure title, in fee simple absolute, what is "the substantial part" in the series of acts upon which *such* party may rely? What is the essential thing in respect to a particular tract of land which ought to give and does give *that* party complete ownership of and title to any particular piece of land? Manifestly that act which segregates particular lands from the great mass of public lands, and thereby confers full disposing power upon the party doing the act.

This is the original act which divests particular lands of the trust character which attached to the region of country, in which the floating grant could be anchored, and puts them in the category of private property, disposable at will by the owner. It is the primary, fundamental fact, "the substantial part," so far as title to particular tracts is concerned.

It is also the primary, fundamental and decisive fact in fixing the quantity of deficiency lands.

There is always, or generally, a deficiency existing at the date of the grant. This deficiency is increased between the date of the grant and the date of locating the road. And this latter deficiency is wholly dependant on the date of location.

Each party selects for itself to make up its own deficiency, not the unascertained deficiency of an unlocated road.

How can the party who is prior in time, do any act for the benefit of a party who has not acted at all? How can he be held to divide *his indemnity*, with one whose question of indemnity has not been ascertained, and who may not find his grant deficient? On what just principle can a grantee who is first in location, first in selection and first in construction be bound to share lands thus segregated, chosen, earned, with one who has done nothing until years after?

In the case at bar, the defendant company not only was first in location, but first in selection and in construction.

We say, therefore, that the doctrine of relation cannot be invoked by a party whose first act or "substantial part" does not ante-date or co-date that of his adversary. That is, there must be some original act of his own, like that of entry and purchase, before he can, in case his legal title is attacked by some one holding a prior conveyance or patent, rely on the rule that will make his own patent run back past and behind the other, to the date of his original act, and thus render the adversary title null. But who has heard of a party whose right was first in time by virtue of having performed the substantial act, being cut out by a party whose substantial act is last, and who is prior in nothing?

The doctrine of relation, can never be resorted to when the result would be to deprive a party of a clear legal right, or when it would work manifest injustice.

21 Ala., 169, 175; 41 Mich., 420.

It is clear that in many, if not in most cases, the rejection of the rule of priority would deprive the vigilant road of a large portion of its grant, especially of its indemnity lands.

In all cases where there is not sufficient lands within the indemnity limits of the road first definitely fixing its line, to fill the grant to that road, (the fact and question of such deficiency being fixed, first and finally, at the date of location,) or where there is not enough for both roads, injury would necessarily result if subsequently, another road could, by a *voluntary unnecessary location* of its line, become entitled to one-half or more, of the deficiency lands of the first road. And the injury would be measured by the number of acres thus abstracted. Now when it is considered that the extent of the deficiency of the dilatory road may have been (in fact invariably is) greatly increased by its failure promptly to locate its line, the injustice of sustaining its claim to a division, under the doctrine of relation, is manifest. A prompt, judicious location and selection might not have disclosed any deficiency. Yet a delay of years—a delay which creates a deficiency—instead of working prejudice to the author of it, receives protection, to the great injury of that party whose vigilant act enabled the other to commit the wrong.

d.

We are aware of the decisions on this point, and we now proceed to consider their scope and effect. They may be divided into classes:

1. Those where the United States was a party, and the question was, when did title enure as against the grantor.

2. Cases where a necessary conflict of routes was produced by the terms of the grant, without qualifying provisions.

3. Cases not involving the question, but in which *dicta* appear, intended to suggest the proper rule.

In Chamberlain v. the St. Paul and Sioux City Railroad Company *et al*, 92 U.S., 299, the court held that the act of March 3, 1857, authorized a sale of one hundred and twenty sections for each road, but no more until a division of twenty miles of the road should be completed.

It follows from this that the road first located, and first getting its 120 sections by specific description, within a continuous length of twenty miles, with full power of sale, has a perfect title thereto and can transfer one. The same is true of the next 120 sections acquired after construction of twenty miles of road, and the terms of the grant and the intention of Congress can be carried out by no other construction.

To the same effect is Farnsworth v. Railroad Co., 92 U.S., 49; Schulenberg v. Harriman, 21 Wall, 49.

In L. *etc.* R. R. Co. v. U.S., 92 U.S., Rep., 733, the court say, "There be and is hereby granted" are words of absolute donation and import a grant *in presenti.* * * * They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. *The grant then becomes certain, and by relation, has the same effect upon the selected parcels as if it had specifically described them.*"

So far as the principle here enunciated applies to such lands "in place" as lie about the designated point of intersection of two or more roads, we do not care to discuss it further than we have already done. It is, however, to be observed that it does not appear that the grant in that case contained any such provisions as are found in section 4, of the act now under consideration. And no allusion is made to any provision regulating sales. The only question in that case was, whether Congress intended that the grant should cover the Osage ceded lands, through which the route of the road run, and the question was decided in the negative by a divided court.

But so far as that principle or dictum is invoked to show that Congress, in the present grant, intended to authorize as many intersections or conflicts as one of the grantees might see fit to make, we insist that it can have no such effect. Lands lying within lines run at certain distances from a designated point, might have been described in the granting act, as to each road; because the designated point would serve as a basis for an intelligible description It would be a monument or corner, with reference to which limit lines might be described, and the lands falling within them be described also

But where no such point is named, no crossing made necessary, by the terms of the act, what possible basis is there for description of any lands, whether "selected parcels" or not, or for inferring that Congress intended to describe them. It is only where overlapping limits are positively required by the terms of the grant, that such lands can be conceived as described in the grant. A non-interfering grant cannot describe lands in conflict.

To imagine a grant which should describe lands embraced within all the lines which the ingenuity, caprice, or self-interest of either grantee might choose to run, is idle. Congress could not if it would, and would not if it could, do so foolish and absurd a thing. It is competent for Congress to enact that its grantees in these cases should run their lines to a common point, or cross each other at a point named, if such crossing be in furtherance of the objects of the grant, and is rendered necessary by the general directions of the different roads. But who ever heard of public grants in aid of two distinct enterprises which are so formed as to mutually destroy each other. Hence the dictum of Mr. Justice Davis, in the case above cited cannot apply to this case. It is not to be supposed that Congress in this grant could or would have described these "selected parcels," piece by piece, as each grantee should designate them. Lands thus specifically described in the granting act could not properly be called "selected lands." They would be granted lands and the grantee could exercise no choice in the matter. We respectfully submit that this is not the true intent and effect of the grant.

Exactly what the learned judge meant by "selected parcels," does not appear. Lands "in place" are lands ascertainable by *description*. Lieu lands may be "selected parcels" when there is opportunity or necessity for choice—some being taken and others left; but it has never been yet held that lieu lands *requiring selection* could be regarded as having been specifically described in the grant, or pass as of the date of the grant by relation, or otherwise. We must be pardoned for suggesting that the learned Justice used this language without due consideration of its effect, as he did in another part of the same opinion where he limits deficiency lands to those "lost by the action of the Government between the date of the grant and the location of the road"—ib, page 749—a distinction which has been disavowed by every federal judge who has passed upon it since it was made.

But can the doctrine of relation, apply, except to lands made definite by location of road? And if it then applies and carries the title to the "selected parcels" back to the date of the grant, is not its force spent as to those lands in making a title in absolute ownership for immediate sale? The grant for the unlocated road is still a float, and may remain so for years. Meantime the diligent party having got its road located and the title to its land made to take effect as of the date of the grant, goes on and sells its first 120 sections, then building 20 miles of road, it sells another 120 sections, lands earned by construction. What title does the purchaser get? What title had the road to give? What title did it give? No doctrine of relation stands in the way, for the laggard road has done nothing to whieh it can apply.

It must not be forgotten that this application of the doctrine of relation is only beneficial to the laggard party, and just in proportion that it is beneficial to him, it is prejudicial to the other; just so much, land as its own conflict gives it, is taken from the other party. The first locator, as against an interfering road, gets no advantage from having its title go back to the date of the grant—it is the last locator whom the doctrine of relation makes first—or if not first, at least equal. If the two roads stood alike, and the contest was between them, and some third party, a stranger to the grant, then it might be just to solve the contest by relation. But here the struggle is to give the whole benefit of the doctrine to one party, and that one the least meritorious.

In Mo. *etc.* Ry. Co. v. Kansas Pac. Ry. Co., 97 U.S., 491, the dates of the grants were not the same, and therefore the case is not an authority for the doctrine of moieties, or that under grants of even date, the grantees will share equally in conflicting lands, whatever the date of the location of the lines.

But there are *dicta* in the opinion, similar to that of Mr. Justice Davis, in 92 U.S., 733, and sufficiently broad to cover all cases, except the case of an *unnecessary conflict*. So far as the case shows there was but *one* conflict, and that a *necessary* one—that is, produced by the act in giving general direction to the different routes. And the learned justice, who wrote the opinion, states distinctly that it is the intent of Congress which must be ascertained and followed, even in a case where, if the grant was between private parties, it would be void for uncertainty.

It is to be noticed that the Congressional acts made an intersection necessary, and thus *ex vi termini*, produced a conflict.

It is also noteworthy that the opinion limits the application of the doctrine of relation, to such lands alone as do not fall within any of the exceptions or reservations contained in the original grant, and makes a like limitation to the title to the enlarged grant, to cases where the title is set up as against the United States.

But the opinion contains this further dictum, viz.:

"The construction thus given to the grant in this case is, of course, applicable to all similar Congressional grants, and there is a vast number of them; and it will tend, we think, to prevent controversies between the grantees, and those claiming under them, respecting the title to lands covered by their several grants, and put an end to struggles to encroach upon the rights of others by securing an earlier location."

If the learned Justice intended to say by this language that in all these grants Congress had provided for a conflict, or intended a conflict, we submit that the facts will not support the dictum. "Similar Congressional acts" can only mean such as contain the same language as to necessary conflicts, with the act then under consideration, or acts of different dates, if the technicalities of construction should be followed. If it was meant to assert or hold that under acts similar to the act of 1857, it was an encroachment on the rights of the supine grantee, for the diligent one to make an earlier location, selection and construction of its road, and lands, and so put itself in a situation to demand and receive its specific sections, then we respectfully beg leave to claim that the dictum is not sound.

In the case at bar, the plaintiff in error had the right to locate its route when it did. It was not only an innocent and lawful act but it was meritorious. There was no undue haste and no "struggle." There was no attempt "to encroach upon the rights of others," for nothing had been done at that time, or for eight years thereafter by plaintiff in error, to secure any "rights" or any specific lands within the territory run over by the first location, or anywhere else. There was no race of diligence, no intention to secure an advantage by an earlier location, but there was reasonable diligence to start the enterprise and thus carry out the intent of the grant. We respectfully submit that the dictum of the learned judge cannot apply to the plaintiff in error here. That if it can have any application it must be confined to the "other party." That party "*struggled*" *to keep still*, and succeeded for many years. It then deliberately "encroached" upon the rights of the first party, and the result is this controversy.

In Ryan v, Railroad Company, 99 U.S. Rep., 382, it was held that the date of selection of indemnity lands controls, so that under grants of even date the earlier selection will out rank the junior, and confer a good title to the selected lands. It is difficult to see how this rule can be sound if the dates of the grants are to control as intimated in 97 U.S. 491. For the intersection of routes made necessary by the terms of a grant, covers lieu lands as well as granted lands; and hence the Land Department at one time adopted the rule of moieties as to common indemnity limits, as well as to common granted limits. And the court below, in the case at bar, followed the old Department rule.

But the act of selection within the indemnity territory, is not more necessary or effectual than than the act of selecting the twenty-mile division within which, the one hundred and twenty sections available for immediate sale may be found. And it is further to be noticed that the act under consideration makes no distinction between granted lands and lieu lands, as to date of ascertainment. If one hundred and twenty sections can be found "in place" available to the grant, then no resort to the indemnity belt is necessary; but if there be a deficiency of "place lands" within the twenty-mile division selected, then it may be supplied from the secondary territory set apart for that purpose, but after this is done the two classes of lands stand just alike, and are a unit in respect to title and quantity, and the disposing power of the grantee over them. They are not granted lands and lieu lands held by different tenures starting at different dates, but they are the one hundred and twenty sections intended for immediate sale by section four, and the proceeds of which, after sale, constitute an irrevocable trust fund devoted to one single special purpose.

It is as unjust and as much a violation of the provisions of that section, to make it impossible to get title to this quantity of land at the outset, as it would be to allow the trust-fund to be diverted after the trust lands had been sold. In either case there is a plain provision of the will of Congress as expressed in the grant. To violate it is a practical and effectual confiscation by judicial construction in favor of an unmeritorious party.

The case of Railroad Co. v. Baldwin, 103 U.S. 426, describes a *right of way* question.

Date of grant of right of way July 23, 1866. Defendant Baldwin claimed as of date October, 1869. Road was located October, 1871.

The section giving right of way contained no limitations or reservations. Held that it gave an absolute title to right of way, as of date of the act, notwithstanding a party claimed the land by entry or purchase prior to a location of the route over the section. That if Congress had intended to qualify the absolute grant of right through the public domain, such intention would have been expressed. This is an application of the doctrine of relation, to cut off an intervening claimant whose right to pre empt or purchase a portion of the public domain was perfect at the date of the grant. Yet he had not asserted his right until Congress had made an unqualified disposition of the particular lands he desired. He had simply waited too long and lost the land on that account.

Wood v. Railroad Co., 104 U.S. 329, was a contract between a pre-emptor and a railroad company. Its grant was one of quantity without any express designation of lateral limits. Yet the implication was that the selection should be made of alternate sections nearest the route. The line was located and the land withdrawn; [illegible] what figure the withdrawal cuts in the contest does not appear. Afterwards the pre-emptor filed his claim and it was held that the company had the better title. Its estate had become vested before the pre-emptor filed his claim under the operation of the doctrine of relation.

It will be seen that all the lands were granted lands, although by reason of shortage it might be necessary to go a long distance from the located line to find lands enough to fill the grant.

The principle of this case seems sufficient to give us the lands under the act of May 12, 1864.

The law permitted pre-emption, the act of March 3, 1857, and of March 3, 1865, permitted location of a line. But nothing had been done under either act to give right to any particular sections of land. As against a specific grant of particular lands no subsequent claim could avail.

Van Wyck v. Knevals, 106, U.S., 360, was a contest between a pre-emptor or purchaser and the R.R. Co. The court announces the application of the doctrine of relation, and holds that a line is definitively fixed when a map is filed duly approved designating the route, whether the lands are thereupon withdrawn from sale, etc., or not.

Cedar Rapids, etc., R. Co. v. Herring, 110 U.S. 27.

In this case, which was between a purchaser from the U.S. and the R. R. Co., it was held that no right attached to lieu lands, until actually selected, and that the doctrine of relation did not apply. At least nothing is said about it.

Held also, that as against the U.S., no right of selection accrues until the *whole line* has been definitely located. That the right of entry exists until the grantee's right of selection has been exercised, and that right cannot be exercised until the entire line has been (completed) established. It is obvious that the situs of the lieu lands is not fixed by the act. "Other lands" is the term used, and a wide range of choice is permitted, since it might be that the State agent would roam about over a wide extent of territory, and exercise a right of choice in regard to vast bodies of land, taking some sections and leaving others.

The act does not locate the lieu lands in the tiers of sections nearest the tiers of wanting sections, as in the case at bar, but simply designates "other lands." The case does not show, as this does, that all the available lands within the secondary territory will not fill the grant. Hence it may have been material to know in that case how many of the original odd-numbered sections were lost to the gaant, before the extent of the right of selection could be known. The act did not give them a location, nor could they be made specific by the protraction of the established lines through the maps of the public lands. Nothing but a specific selection could bring them within the grasp of the grant. But in the case at bar the act executes itself as to all the lands at once upon location. Before location of the route, neither the number of lands in place nor their situation on the face of the earth are known.

The granted sections are just as indeterminate as as the wanting sections. The same act which gives precision to one class gives like certainty to the other, and also to the lieu lands, the location of which is determined by the act itself. When a section is found wanting, the tier of sections in which it lies, and the tier "nearest to it" from which it is to be supplied appears also; and when it is an admitted fact, as it is here, that all the lieu lands would not suffice, unmistakable certainty is given to the whole body of lands donated. There is no scope for choice. One section cannot be taken and another left, but all are absorbed by the grant, and still a deficiency remains. The doctrine of 110 U.S. 27, does not apply. But if it should be held to apply it will operate in our favor, since our selection was first in time. In location of line, selection of lands and construction of road the plaintiff in error is ahead.

In United States v. Burlington & Miss. R. R. Co., 4 Dillon, 299, it was held, per Miller, J., that where a grant of five sections per mile on each side of the road, within twenty miles thereof, was amended by striking out the word "five" and inserting the word "ten" in lieu thereof, and by striking out the word "ten" and inserting the word "twenty" in lieu thereof, that the grant as amended took effect as of the date of the original act, and therefore outranked an act to another road passed at the date of the amendatory act. But the court distinctly places this on the ground that two roads were required to connect and cross each other, and that it was reasonable to infer that Congress intended to preserve the priority of the first grant in its enlarged form. Moreover the court was particular to say that such retrospective character would not probably be given to the amendment in a case where intervening rights had attached. This case, therefore, is authority for our position that the act of March 3, 1865, was a new and distinct grant, intended as a substitution for the act of March 3, 1857, and cannot be so interpreted or enforced as to cut out the prior graut of May 12, 1864, to the plaintiff in error here. Besides the language of the act of 1865, imports a new grant of the enlarged quantity.

In Knevals v Hyde, 1 McCrary, 402, it is held that upon the filing of a map in the office of the Secretary of the Interior, the line of the road became "definitely fixed" and would take precedence of an entry or purchase made thereafter, but prior to the transmission of the map to the local land office.

The same principle, to-wit, that these grants take effect from the time that the line of the railroad is definitely fixed, is adopted in Taboreck v. The B. & M. R.R. Co. 2McCrary, 407.

In Kan. Pac. Ry. Co. v. A. T. & S. F. R. R. Co. 2 McCrary, 550, it was held that when a grant was enlarged by a subsequent act embracing lands which had been by an intervening act granted to another, and withdrawn before the passage of the enlarging act, the party claiming under the intervening act would take the land.

The only case deciding that lands in conflict shall be equally divided between the two grantees, where the question was necessarily before the court, is that of Sioux City and Pac. R.R. Co. v. Union Pac. Railroad Company, 4 Dillon, 307. Here again we have two roads which by the terms of the common grant *must unite*, producing a conflict of limits as to lands within the common territory, and the decision is put upon that ground. While, therefore, it is against our first position, it in no respect is opposed to the second, but on the contrary, by strong implicatiou, supports it

As to cases where fhe conflict is not imperative.

The case of Morris & E. R.R Co. v. Blair *et al.*, 1 Stockton, 335, is so nearly in point that we quote the opinion in support of our position:

"In the first place it should be observed in reference to the road of the two companies, as authorized by their charters that they start from entirely different points some fifteen miles distant. * * * Neither has a specific terminus assigned. The complainants are authorized to go to the Delaware River anywhere between Belvidere and the Water Gap, a distance of fifteen miles. The Warren Company may go to the river anywhere below a point five miles above the Water Gap. One road is designed to connect the Morris & Essex road with the river; the other to form a connection between the Central Railroad. They are to complete two independent railroad lines across the State and there is no route granted or prescribed to either, other than their commencement and indefinite *termini* above described. Nothing therefore appears upon the face of their charters creating a necessary conflict of routes; each company is at liberty to select its own route and its own termination upon the river within the prescribed limits. * * * There is no conflict on the face of the charters, and no necessary conflict in carrying out the objects of the charters. The conflict is one, *not of necessity*, but of choice in the selection of routes by the companies, and in my opinion, therefore, the prior right will attach to the company which first actually surveyed and adopted a route and filed their survey in the office of the Secretary of State."

II.

There can be no mistake as to the character of the act of May 12, 1864. It was a grant of quantity, not of indemnity. It was a distinct act by itself, save as hereinafter noticed, not an amendment to the act of March 3, 1857. It was a grant to *one road*, not to all named in the act of 1857, as was the act of 1865.

It was a present grant to a road already located, and upon the facts admitted in this case, covered all the available lands embraced within the additional territory named by the act. That is to say, taking all the lands in the place reached by the act of 1857, and all the lieu lands within the limits designated by that act, and the four additional sections per mile granted in the act of 1869, there would still be a shortage, which all the lands involved in this controversy would not supply.

Selection, therefore, in this particular case, was unnecessary, immaterial, nugatory.

There was nothing to leave, no choice to be exercised, all were appropriated by force of the act alone, upon the admitted facts. Still there were "conditions, restrictions and limitations" to be observed as provided in the act of 1857. What were they, and how do they affect the present controversy? Reference to a deficiency under the original grant could not have been intended, for the grant is absolute, the extent of it declared: "four additional alternate sections per mile." Therefore, whatever the shortage under the original act was, or whether there was or was not a shortage, the quantity was the same, four sections per mile. The restrictions and limitations upon sale found in the act of 1857 would apply, so that no more than 120 sections within any 20 mile division could be sold in advance of construction.

The suggestion contained in the opinion of the trial court that, the grant of 1864, must be considered as limited to the reservation clause in the act of 1857, is not sound. That provision, considered as a limitation upon the grant, could only apply to lands previously appropriated, not to those granted by the act itself. Hence, if it should be held to be incorporated into the act of 1864, its effect could not be enlarged thereby. It would have only the scope given it by the original act.

That no other intention can be predicated of that provision may be further supported by comparing the language of the proviso in the 3d section of the act of 1865, by which it was intended to reserve from the operation of that grant, all land previously granted to Minnesota in aid of railroads. . Hence we claim that Congress granted this additional quantity of land to a road, whose exterior lateral limit line was fifteen miles from its located line, and gave a separate five mile strip outside the original 15 mile line in which to locate it.

That inasmuch as all the available land within the original 15 mile limits would not fill the first grant, all the alternate sections lying within this exterior five-mile belt being required to fill the grants, would pass under the grant of May 12, 1864, at the instant of passage, for the defendant in error, had done no act to bring any part of such new territory under the grasp of the act of 1857, for the benefit of its line of road. It could not then be told, the defendant in error had not itself determined, where its line would be run. Congress had the right to make a specific grant of land to the vigilant road, or any road, and such grant would divest no title theretofore vested. As was said in Fremont v. U.S. 17 Howard, 542–558:

"It is true that if any other person within the limits where the quantity granted to Alvarado was to be located had afterwards obtained a grant from the Government by specific boundaries before Alvarado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey of Alvarado. As between individual claimants from the Government, the title of a party who had obtained a grant for the specific land would be a superior and a better one. For by the general grant to Alvarado the Government did not bind itself to make no other grant within the territory described, until after he had made his survey. But as between him and the Government he had a vested interest in the quantity of land mentioned in the grant."

So in Henshaw v. Bissell, 8 Wall. 266-7, the court per Field, J., says:

"The language of the court in Fremont's case would seem to justify the conclusion that the floating claim first surveyed and thus severed from the public domain, would carry the title to the premises. * * * A second floating grant, the claim under which is first surveyed and patented, and thus severed from the public domain, would seem to stand with reference to an earlier floating grant within the same general limits, in the position which the subsequent grant with specific boundaries mentioned in the citation, would have stood to the general grant to Alvarado."

It would seem that there can be no doubt on this point. An independent grant to a located road, thus making, as here, a grant of specific sections of land, must take precedence over a prior general grant to a road not located, and which, at the date of the junior grant, has taken no effectual steps to make its grant certain. Government action in respect to the public domain cannot be paralyzed and held in abeyance by the supiness of one of its general grantees.

Of course no question as to the intent of Congress can arise in respect to the grant of 1864.

It is a single grant made to one road, no other being named, and that grantee is entitled to its benefits in severalty beyond question.

III.

We again call attention to the fact that the plaintiff in error makes no claim—never has made any claim to the benefits supposed to be conferred on all the lines named in the act of 1857; but, on the contrary, repudiates its application to its line, which had a better grant in May, 1864. Having this specific grant of designated lands, ante-dating the other by nearly a year, it is not compelled to abandon the first and accept the last. On the contrary, the act of 1865 is expressly made subject to the act of 1864 by the terms of section 3. It is the defendant in error which must accept the act of 1865, and take its lands under that act so far as it becomes entitled to lands after that act passes.

Those changes appear to be the following, so far as material here:

Ten sections per mile are granted, instead of every alternate section for six sections in width.

The grant is changed from one in place, to one of quantity.

The exterior line of the grant is changed from 15 to 20 miles from the located line, *and the said granted lands shall in all cases be indicated by the Secretary of the Interior.*

Section 3 re-enacts the last proviso in section 1 of the act of 1857, and adds a new and important provision bearing upon lands granted by the act of 1864.

Section 4 re-enacts section 2 of the original act, and contains a new clause relating to settlers.

Section 5 is section 3 of the original act.

Section 6, enacted in lieu of section 4 of the original act, is new and works a great change in the grant in several respects.

It substitutes ten-mile divisions of constructed road for twenty, giving no authority to sell any land in advance of construction, and adopting the coterminous principle in the selection of lands to be patented as the work progresses, reserving until full completion of the road the balance of the grant; all rights existing under former laws, making grants to the State for railroad purposes, are preserved. *No lands can be disposed of except as the same are patented.*

Section 7 is *new*, authorizing the Governor to file maps designating the different routes.

Section 8 is substantially the same as section 5 of the original act.

Section 9 is new, applying to a road other than the litigants here.

Sections 10 and 11 are new, but do not affect this controversy. Sections 6 and 7 of the original act are dropped.

It is evident that this act is a substitute by amendment and enactment, for the act of 1857. It was enacted before the road of the defendants in error, was located along and past of the lands in controversy. Defendant could get no lands by twenty mile divisions, nor could such division be selected everywhere along the line, but must connect with one previously selected. The lands granted could only be selected by the Secretary of the Interior, and could not be certified to the State, but could only be patented, not when selected, but after the Governor had certified that ten miles of road had been built in a particular manner. Its rights, as to extent, execution and enjoyment were measured and controled by this act. It is prohibitory as well as permissive.

There is no possible ground for holding that it can subsist and become operative, as to defendant in error, alongside of the act of 1857, that being operative also, the two cannot stand together, as to matters not perfected under the first act on March 3, 1865.

But the plaintiff in error, stands in no such position. The act of 1857 as to it was not affected by the act of March 3, 1865. It had a located line, and a new independent grant had been made to it which was satisfactory, and which had been accepted by the State prior to the passage of the act of 1865, Special Laws of Minnesota for 1865, page .

The act of 1857 as originally passed and the act of 1864, under the facts found and admitted, together, formed one consistent harmonious grant of substantially the same quantity of land as was granted under the act of 1865. The lands were segregated from the general mass of public lands, and the title thereto had become vested in the grantee prior to the passage of the act of 1865. Hence there was not only no necessity for including plaintiff in error in the act of 1865, but it was not competent for Congress to affect its status or force upon it a substitute which should interfere or divest rights and interests previously vested.

To recapitulate briefly.

There were two grants of quantity—one under the act of 1864, and the other under the act of 1865. But the first being conferred upon a located road was made certain by that fact, inasmuch as the whole quantity within the specified limits would not make up the deficiency.

The other not being to a located road, was a float and attached to no specific land, and could not, until location of the line. The line could be run far enough away from the located line of the other road to avoid a conflict, and secure land sufficient to fill the grant, But it was run so near as to make a conflict, and so fail of getting a full grant.

Now our proposition is applied to such a case, that the lands appropriated under the act of 1864, become severed from the public domain and so reserved from the grant of 1865, on the principles established in, Bissell v. Henshaw, 18 Wall. 255.

IV.

The error assigned under this head is manifest.

The trial court held, and his judgment was sustained on appeal, that a location to a given point, as the west line of range 37, gave precision to lands beyond that range, and attached them to the grant as effectually as if they were coterminous with the line actually located. For this ruling there is no support either upon principle or authority. The rule in the Land Department has been uniform. Lines are run at right angles to the located line, and these bound or define the extent of the grant. The end of a route, the point where the line of definite location stops, gives no certain indication of the direction another survey beyond that point will take, should such survey ever be made; the next move might be straight ahead, might turn either way on a sharp curve, or it might be deemed advisable to abandon the first line and make a new starting point, miles back and so reach a more valuable body of land or get a better line for construction. If it be true, as this same court held, that a party lost nothing by delay and could make as many conflicts as it pleases without regard to a straight cut towards the the terminal point, then the inference as to the probable direction of an extension of such line from any given point, would be just the reverse of that found by the trial court in this case.

It hardly seems necessary to enlarge upon this point. Our contention is that such portion of the lands in controversy as lie west of range 37, were not affected by any act of the defendant in error, or brought within the grasp of its grant at the date of the passage of the act of 1864. That they were unappropriated public lands subject to the disposing power of Congress, and were specifically granted to the plaintiff in error, by the act of May 12, 1864. That in 1865, when the new act passed, these lands were expressly excepted from its operation by section 3 of that act, and could not thereafter be appropriated for any other road. They were lands to which the act of 1865 did not, and could not apply.

V.

There is another manifest error: The definite location of a line of road is an entirety—it dates from the last step, not the first—for the last step alone makes it definite, fixed, not subject to change.

There is no first act which is of any importance or significance. The direction of the company to its engineer, to get up a party and make a location is perhaps the initial step. The first man engaged or the first bag of beans purchased for subsistance is the first step in carrying out the command. None of these are of the slightest importance, nor is the driving of the first stake or the running of the first course.

It is the action of the company upon some designated line; the approval of the Land Commissioner of some particular route, shown on a map, that is the "substantial part" from which all rights must arise and to which all fictions must relate. Hence we say that the location commenced in April, 1864, did not culminate until August, 1864, after the act of 1864 was passed, and therefore the survey east of the west line of range 37, so far as it effects the limits in controversy, did not have force or withdraw from the grasp of our grant, the specific sections granted.

The road of the defendant in error. was finally located directly over the belt of lands granted by the act of 1864 for the sole benefit of our road. It now holds the lands as granted lands, or lands in place, and treats our grant of 1864 merely as giving an extension of indemnity limits. The court below so held, erroneously, as we insist, and we therefore ask a reversal of the judgment as to all the lands in controversy.

The fact that defendant in error erroneously located their line directly over our previously granted sections, and thus brought them within what it calls its six mile limits, does not give those limits any greater dignity or force, than the twenty mile limits have under a similar location. If the grant does not, by a fair interpretation, confer or give claim as against a prior locator, then, as to him, it has no limits at all. Such limits may exist and be legal for all other purposes except a successful raid on the lands of another road, but calling them "granted limits" does not add to their efficacy in the slightest degree. The intent of the grants, as disclosed in the grant, must control.

E. C. PALMER,
Counsel for Plaintiff in Error.

112-720

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Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 139.

THE SAINT PAUL & SIOUX CITY RAILROAD COMPANY, *et als.*,
Plaintiffs in Error,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY,
Defendant in Error.

Brief of Plaintiffs in Error on Motion to Dismiss.

E. C. PALMER,
Of Counsel for Plaintiffs in Error.

ST. PAUL:
H. M. SMYTH PRINTING CO.
1884.

Supreme Court of the United States.

OCTOBER TERM, 1884.

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THE SAINT PAUL & SIOUX CITY RAILROAD
COMPANY, *et als.*,
Plaintiffs in Error,
vs.
THE WINONA & ST. PETER RAILROAD
COMPANY,
Defendant in Error.

I.

The record discloses several federal questions lying at the root of the controversy, and which had to be and were in fact decided by the State court adversely to the title and right specially set up and claimed by the plaintiff in error.

The complaint claims title to the lands in suit under and by virtue of the act of Congress of March 3, 1857, (Statutes at Large, vol. 11, ch. 99, p. 196,) and the act of March 3, 1865, (Statutes at Large, vol. 13, ch. 105, p, 526.)

Paragraphs third, fourth, fourteenth, fifteenth, seventeenth, twentieth, twenty-second, twenty-fifth and thirtieth of the complaint. See Record, pp. 1–11.

The plaintiff in error claims title to the lands in controversy under and by virtue of said act of March 3, 1857, and also under and by virtue of the 7th section of the act of Congress of May 12, 1864. (Statutes at Large, vol. 13, ch. 84, p. 72.)

Paragraphs 21, 22, 23, 27, 28, 29, 30, 32, 33, 34, 35, 37, 41, 43, 44, 46, 46½, 47, of the answer. (See Record, pp. 19–31.)

It will be seen that the pleadings raise the question of title, and rest its validity on the force and effect of the several acts above referred to, in connection with certain matters of fact which the court had to find and did find on the trial.

The source of title was the act of Congress. The grant in each case, the time when and the extent to which the grants became effective as to the lands in controversy, upon the facts admitted and found, were questions for the court, and were Federal in their character, relating exclusively to statutes of the United States.

These questions formed the substance of the controversy. The litigation could not be maintained or closed without their determination, and hence we find that they were decided by the State courts.

It will be noticed that under the Minnesota Code, the judge trying a case without a jury must find the facts and conclusions of law separately. (Gen. Stat. 1878, ch. 66, sec. 242.)

The "finding" in this case commences on page 83 and ends on page 120 of the Record.

We call particular attention to page 85, referring to the act of March 2, 1865, of the Legislature of Minnesota, and to pages 103, 104 and 110, paragraph XI, as well as generally to the fact that the "finding" contains scarcely a line that does not in some sense relate to matters growing out of the grants under which the litigants claimed and asserted title to the lands in controversy.

The conclusions of law embrace and decide every Federal question presented.

We quote, commencing on page 105, Record:

I. "That the act of Congress of March 3, 1857, was in itself a grant *in presenti* to the Territory, of lands to aid in the construction of the several lines of railroad particularly mentioned." * * *

III. "That the parties are not concluded by the determination of the officers of the Department of the Interior as to the law of the case heard and determined before them, and that a court exercising equity jurisdiction will consider, in a case properly presenting for adjudication the rights of parties as between themselves, whether the decision of the Department was based upon a correct construction of the law applicable to the case."

V. "That under the act of March 3, 1857, priority of location by one of the roads therein named, does not confer a right to lands falling within the limits of the grant as defined by such location, superior to that of another of such roads subsequently, but within the time limited by the grant, located."

VI. "That the rule adopted and followed by the Department of the Interior prior to the commencement of the controversy concerning the lands in question in this case, as to the mode of disposing of lands found to be within conflicting limits of two of the roads referred to in the granting act, as is shown in the foregoing findings of fact, is the proper rule to be applied in such cases, that is to say: Lands in place or lying within the limits of the grant (as distinguished from indemnity limits) of one road and outside the granted limits of another road belong to the former road; lands lying within the common limits of both roads enure to the benefit of each alike, and they take as tenants in common." * * *

IX. "That the twenty-mile limits of the road, as fixed by the action of the Department in this case, must define the boundary of such indemnity belt to which the defendant may resort for such purpose; and in considering whether particular lands selected for indemnity are 'within twenty miles of the line of said road or at a greater distance therefrom,' we are in this case to examine only with reference to that line which for so many years the land department of the government has recognized as the line of definite location of such road, and upon which alone this land grant has been administered, both by the General and State governments, and with the acquiescence, as it would seem, until this controversy arose, of the parties to this litigation."

X. "Under the act of 1857 the interest of one of the roads therein named in a specific belt of indemnity lands as also in the lands in place, attached as against a subsequent grant from the general government only 'when the line of route of said road became definitely fixed' through the particular territory, so as to enable the proper department of the government to prescribe 'limits,' and to take such action as was necessary in administering the grant. The survey of the plaintiff's line west of range 37 not having been made until November, 1866, it had not acquired as against this defendant, claiming under the intermediate act of 1864, any vested right in respect to lands west of that range and outside of the six-mile limits of the former (plaintiff's) road as it was finally located, and as to such lands by virtue of the acts of Congress of 1857 and 1864 and the legislative acts above referred to, both companies are entitled alike to resort to make selections for indemnity. The defendant did not, by the prior location of its line, acquire a vested interest or title to these lands as against the plaintiff claiming under the act of March 3, 1857."

XVI. "That this plaintiff and the defendant, the St. Paul and Sioux City Railroad Company, are each the owners in fee of the undivided one-half of each and every piece and parcel of land described in schedule "C" attached to the complaint herein, and also of the northwest quarter of section 17, township 107, range 40, (which was brought into this action by amendment pending the trial,) and each of said parties is entitled to receive from the governor of the State a deed of conveyance of such undivided one-half of such lands. It is ordered therefore that judgment be entered in this action as above indicated."

Plaintiff's counsel not being satisfied with the foregoing findings moved the court to reconsider and modify and change them in certain respects, which motion and proceedings in that regard are found in the Record, pages 53 to 59. The court entertained the motion and upon further consideration made certain additional findings which are set forth in the Record, pages 111 to 120, and which so far as they seem to bear on this motion to dismiss, we quote as follows:

XVII. "The act of May 12, 1864 was a present grant of 'four additional alternate sections of land per mile;' but although it may be considered that the line of defendant's road had been definitely fixed, yet such additional grant was not by the act itself made certain and attached to specific lands unless by reason of the deficiency in the grant rendering selections in this particular case unnecessary.

"The lands granted by this act were to be selected from the lands of the United States nearest to the tiers of sections in place granted by the act of 1857, or to the belt of sections taken for indemnity under the latter act. In a case where the indemnity sections enuring to the defendant under the act of 1857 had already been selected or certified to the State, then four additional sections would be selected nearest to such tiers of indemnity sections so taken.

"But where resort had not already been had to the indemnity belt of 1857, selections of lands sufficient to make good the grant of ten sections per mile might be made, commencing at the exterior line of lands in place (6-mile limits under the act of 1857) and taking the requisite number of sections nearest to the tiers of sections in place. In this particular case it is considered and held that the failure of the defendant to make formal selections of the lands in controversy west of range 37, and of the two tracts specifically named in range 35, should not prejudice its claim to such lands for the reason, *first*, that its grant is so far deficient that all of the lands within the deficiency limits would not make it full; and, *second*, that the question as to whether the plaintiff or defendant is entitled to these lands, and whether they would be certified to the State on account of either line of road, has been carried by the parties before the proper officers of the land department of the government and Secretary of Interior, and submitted to investigation and decision there, and the lands have been certified to the State. Whatever may have been the reasons which suggested the requirement of selection of lands for indemnity purposes or to make good a grant of a given number of sections per mile as in the act of 1864, whether such reason related to securing a proper administration of the grant as between a single beneficiary and the government or to the adjustment of the grant where there were conflicting or adverse claims, whether selection was deemed necessary to define and make certain the precise lands falling under the grant or was only deemed expedient as a proper step in the process of adjustment,in any or either case, the objects to be attained by a formal selection of the lands have been accomplished in the case under consideration, unless the mere act of selection, as a step of diligence, is to be held to give priority of right; and in respect to this I hold:"

XVIII. "That as between two railroad corporations, the building of both of whose lines is sought to be promoted by federal grants like those of 1857 and 1864, and either of which (corporations) would be entitled to make selection for purpose of indemnity, or to make full a grant of a given number of sections,and where the entire belt from which selections are to be made is insufficient to make good the grant of either, neither party by priority in selecting acquires a right to the land to the exclusion of the other, unless perhaps where the laches of one party shall have worked to the prejudice of the other.

"The ability to make a location of a line of road and hence of fixing the tract where selections may be made, so far depends in many cases upon circumstances over which the parties can exercise no control, for instance the progress of the government surveys, that to make the rule *prior in tempore potior est in jure* to apply in such cases to the mere act of selection, would often defeat the plain purposes of the grant."

XIX. "Again it is held that so far as relates to the fixing of plaintiff's line of location between ranges 31 and 38 as identifying the lands between these ranges falling under the operation of the grant of 1857, the time when the grant was actually surveyed and marked upon the ground is to control, the lines so surveyed having been subsequently adopted and recognized by the Government as its line of location. Such subsequent recognition relates to the principal original act of surveying and marking the line. (Johnson v. Ballou, 28 Mich. 377–396.) This date was April, 1864, and prior to the grant of May 12, 1864, and the lands in controversy east of range 38, except the south half of the southeast quarter and the south half of the southwest quarter of section 3–107–35, being within the six-mile limits of plaintiff's line, would enure to it alone. The two tracts above referred to in section 3, being within the common indemnity limits of both roads, they would take the same as tenants in common."

XX. "In respect to the lands in controversy lying west of range 37, the further argument of counsel and the further consideration which has been given to the subject have led to the conclusion that the *tenth* and *sixteenth* conclusions of law as originally found should be modified. That in respect to such lands the parties have not equal interests, and that either the plaintiff is entitled to them under the act of 1857, or the defendant is entitled to them by reason of the grant of 1864 preceding the location of plaintiff's road west of range 37. The reason why the junior grant of 1864 would hold these lands (outside of defendant's 15-mile limits), notwithstanding the prior grant of 1857, if such is the proper construction of the grants, is to be found not in the fact that the grant of 1857 was not an actual grant *in presenti*, nor that Congress has manifested any purpose to impair the earlier grant or to deprive the parties of the full benefit originally intended to be secured by it, but in the legal principle that while a former grant remains undefined by any means and afloat, a succeeding grant of lands identified by an already located line of road or otherwise, will take effect upon specific tracts of land to the exclusion of the former. This proposition as a general principle is perhaps well established. (Railroad Company vs. Fremont County, 9 Wallace, 89–94.) I have been unable satisfactorily to determine whether except for the peculiar facts in respect to location which will presently be adverted to, this principle should control and give these lands to the plaintiff, or whether, on the other hand, the grant of 1864 should be construed as giving the four additional sections subject to the prior right of the plaintiff to locate its line and take its quota of lands under the act of 1857, under the proviso in respect to prior appropriated lands, which proviso, as it is contained in the act of 1857, is brought over and becomes a limitation provision in the act of 1864.

"But if the reason upon which the above legal principle rests has been correctly suggested it would seem that anything which served to identify the lands following under the operation of the earlier grant before the enactment of the latter one would leave no room for the application of the rule. If now, the proposition already asserted that for the purpose now under consideration, the time of actual location of a line, where followed by the proper steps to secure its recognition by the government, is to be taken as the date of definite location of such line be correct, it would seem to follow in this case that the same act of the parties by survey, &c., in April, 1864, which served to mark and make certain the granted lands and indemnity under the act of 1857, as claimed by plaintiff between ranges 31 and 38, also necessarily identified and made certain the lands in controversy west of range 37, excepting one single tract, as being lands granted for the construction of plaintiff's road by the act of 1857.

"If we assume what has been above held to be the case, that in April, 1864, the line of plaintiff's road was located so far as location is necessary to give precision to the grant to the west line of range 37, and look at Exhibit "A," the map attached to the complaint, and which as has been found shows the lines of both roads as located as well as constructed, we find the precise terminal point of such location to be in the middle of the west line, town 108, range 37. Beyond this point no location or surveys were made until 1866; the ultimate terminal point of the road as fixed by the enactments before referred to was a point on the Big Sioux River south of the 45th parallel of north latitude.

"No direct line can be drawn as a glance at Exhibit A or any map of the State will show from the middle of the west line of town 108, range 37, to any point on the Big Sioux River, which would not include all of the lands in controversy west of range 37, within a 15-mile limit, excepting as to the N E. ¼ of 17–107–40; and more, no line of location could be made in any direction from the terminus of this location of 1864, that would not include such lands within a limit of 15 miles, for all of such lands are within 15 miles of that terminal point of location of 1864. This being so it would be seen that the location up to the west line of range 37 in April, 1864, affixed the grant of 1857 to the lands in question, for it was thereby made certain that such lands would fall within the 15 mile limit of the line when it should be extended beyond range 37.

"It may be said that the location might never be made beyond range 37, and the road might never be built. But the question is not whether these lands had been earned by construction, nor whether the title of the State was so discharged of the conditions of the grant that it might dispose of the lands, but the question is what is necessary to give precision to grants actually made *in presenti*, and whether these lands were by the location already made up to range 38, indicated as lands necessarily falling within the grant of 1857, so that as to them the grant could no longer be said to be afloat.

"If the premises are correctly found from the facts set forth, I see no escape from this conclusion, and hence hold that the survey of plaintiff's line *to* the west line of range 37 as shown in the findings of fact herein and the subsequent adoption of such surveyed line and its recognition by the general government, had the effect to indicate the lands in question beyond range 37 except as to the said one tract in township 107, range 40, as being within the operation of the grant of 1857, and that defendant acquired no interest in them under the act of 1864."

XXI. "It is therefore held that as to all of the lands in question, excepting the northeast quarter of section 17, in township 107, range 40, and the south half of the southeast quarter and the south half of the southwest quarter of section 3, township 107, range 35, the defendants and none of them, have any right, title, interest or estate in the same; that plaintiff is the owner in fee of the same and entitled to receive a deed of conveyance of the same from the governor of the State as evidence of its title; that the defendant the St. Paul & Sioux City Railroad Company, its officers and agents should be by the judgment of this court forever restrained from applying for or receiving or accepting from the governor of the State a deed of conveyance of such lands."

XXII. "As to the lands in section 3, township 107, range 35, last above named, that the plaintiff and the defendant corporations are owners in fee each of the undivided one-half thereof and entitled to receive deeds of conveyance of the same."

XXIII. "As to the northeast quarter of section 17, township 107, range 40, the defendant is owner in fee of the same and entitled to a deed of conveyance of the same as evidence of such title. It is therefore ordered that judgment be entered herein in accordance with the above findings."

The propositions considered and decided, as above set forth, are all of Federal cognizance, arising out of Federal statutes, set up and relied upon by the litigants respectively as the source and support of the title each asserted to the lands in controversy. No judgment could be rendered outside of the issues raising these questions. No judgment was rendered which did not rest on the aforesaid findings for direction and support.

The Supreme Court of the State,on page 148 of the Record, specifically affirms the findings and judgment of the trial court, and passed upon no material issues or questions other than the Federal questions which went to the merits.

Counsel for this motion says that "the Record shows that the State had title to these lands and conveyed them to one or the other of these parties—the sole question being to which party. That is not a Federal question."

Page 8 of Brief.

The counsel is mistaken. The court did not decide that the State had title to the lands.

Again we quote, (Record, page 108):

VII. "The acts of the State Legislature by which the grant made to the Territory was in terms granted, vested in and transferred to these corporations, while they would have been inoperative to effect a transfer of more than 120 sections of land in the first instance, and prior to construction, are now to be construed as having effected the grants which they purport to make and to have passed to the respective companies all that by the congressional grants had been conferred upon the State. The roads have long since been constructed, and the State enactment is operative as a grant, and the legal title to these lands is no longer in the State."

XI. "While the title to the lands in controversy has already passed from the general government and from the State to the respective corporations, parties herein, yet a deed from the governor of the State to this defendant of the lands in controversy to which it is not entitled, would, under the facts found, impose a cloud upon the title of the plaintiff and work such injury as that this court ought to exercise its authority to prevent such results."

Page 110, Record.

XIII. "There is not a defect of parties. *The title concerning which the court is called to adjudicate is not in the State.* Of course the State cannot be sued in its own courts, nor do we assume any jurisdiction over the State executive, but only to adjudicate as between those who are parties to this action."

Record, page 110.

As the defendant in error acquiesced in these rulings and took advantage of them to sustain its action and get the benefit of a judgment, it cannot now be heard to maintain a contrary view on a motion to dismiss.

But suppose the legal title was in the State; it was not there as the private property of the State, in fee simple, absolute. It was a trust fee, and the State had no other relation to it save that of a trustee; the duties whereof were defined and set forth in the congressional grants. Hence a controversy as to title between two or more claimants could only be determined by a consideration of the sources of title, the grants, in their intent and meaning, their scope and effect. The character of the parties claimant, could have nothing to do with it. It was not a question of parties, not a matter of personal choice, or of identity, like the case of *Carpenter vs. Williams, 9 Wall., 785*, quoted by counsel, but a question of right or title, derived from divers congressional grants.

Again the Record shows that these lands were certified to the State expressly for the benefit of the plaintiff in error. (Record, page 104.) The governor had no right or authority to do otherwise than give that party the proper evidence of title, as a mere formal and ministerial matter.

If the legal title had been in the State and the governor had not been under legislative coercion to make the proper conveyance, it is difficult to see how the court below could have obtained jurisdiction of the case, or compelled the State or the governor to have acted at all in the premises, or made its judgment practically effective. *Johnson v. Tousley, 13 Wall. 72.*

But the court expressly found and held that the legal title was not in the State, and therefore the subject matter and the parties were properly before the court and their respective titles and claims could be fully adjudicated. This put the case just where it would have been had the governor's deed been delivered to the plaintiff in error, before the action was begun.

The plaintiff below would have made substantially the same allegations, the same proofs, the same legal contentions, and claimed that the defendant below held the title in trust for the rightful owner, and ought to be decreed to make conveyance to the plaintiff. Such in substance and effect is the present action as entertained and treated by the State courts. It is true that in every action to quiet or determine title to real estate there must be parties plaintiff and defendant, and the litigation must result as a general rule, in designating which party is the owner and entitled to recover; but if this fact should be held to be conclusive against the existence of Federal questions, no judgment in a State court could be reviewed in the Supreme Court of the United States, and its jurisdiction would be wholly taken away in this class of cases.

But such is not the law. It is not the party but the right or title set up by the party which controls, and if that right or title rests on an act of Congress and the decision of the State court is adverse to such claim, the case is one of Federal cognizance.

Miller vs. Nicholls, 4 Wheaton, 311.
Cohen vs. Virginia, 6 Wheaton, 264.
Buel vs. Van Ness, 8 Wheaton, 312.
Willson vs. Marsh Co., 2 Pet. 245.
Satterlee vs. Mathewson, 2 Pet. 380.
Harris vs. Dennie, 3 Pet. 292.

Craig vs. Missouri, 4 Pet. 410.
Davis vs. Packard, 6 Pet. 41.
Crowell vs. Randall, 10 Pet. 368.
Armstrong vs. Athens County, 16 Pet. 281.
Neilson vs. Lagow, 7 How. 772.
Lytle vs. Arkansas, 22 How. 193.
Berthhold vs. McDonald, 22 How. 334.
Carondelet vs. St. Louis, 1 Black. 179.
Minnesota vs. Batchelder, 1 Wall. 109.
Bridge Proprietors vs. Hoboken Co., 1 Wall. 116.
Semple vs. Hagen, 4 Wall. 431.
Silver vs. Ladd, 7 Wall. 219.
Furman vs. Nichol, 8 Wall. 44.
Aldrich vs. Etna Company, 8 Wall. 491.
Railroad Co. vs. Fremont County, 9 Wall. 89.
Thebilcock vs. Wilson, 12 Wall. 687.
Johnson vs. Tousley, 13 Wall. 72.
Railroad Co. vs. Maryland, 20 Wall. 643.
Home Ins. Co. vs. Augusta, 3 Otto, 116.
Keith vs. Clark, 7 Otto, 454.
University vs. People, 9 Otto, 309.
Railroad Co. vs. Mississippi, 12 Otto, 135.
Williams vs. Bruffy, 12 Otto, 248.
Baldwin vs. Stark, 107 U. S. Rep. 463.

The cases cited by counsel in support of the motion to dismiss are not in point.

In Gibson vs. Chouteau, 8 Wall. 314, the court hold that no Federal question appears in the record; that neither the argument of counsel nor the opinion of the court on an application for a rehearing, can be resorted to for the purpose of showing that a Federal question was in fact decided when the record proper does not so show.

In Murdock vs. Memphis, 20 Wall. 590, the court hold that the twenty-fifth section of the judiciary act of 1879 is repealed by the second section of the act of February 5, 1867, (Rev. Statutes, § 709), but that the new act gives broader scope to the inquiry as to whether a Federal question has been raised and decided; that this Court can now look into the opinion of the State court, if in the record, to sustain the jurisdiction.

In Rector vs. Ashley, 6 Wall. 147, the court held that the title set up by Rector was dependent upon the act of Congress of February 17, 1815, and the decision of the State court being against that claim, it was a proper case for review in this court.

The case seems directly opposed to the position taken by counsel in support of this motion.

In Carpenter vs. Williams, 9 Wall. 785, the question was one solely of personal identity. No question of title, or construction of an act of Congress was involved.

But in the case at bar the action of the Secretary of the Interior in awarding the lands to the plaintiff in error was directly assailed, and held to have been erroneous by the State court. The title was in dispute as derived from the acts of Congress set up in the pleadings, and the decision was against the plaintiff in error.

In Moore vs. Mississippi, 21 Wall. 636, the court held that the record showed upon its face that a Federal question was not necessarily involved, or raised, and that in such case the court would not go outside the record, to the opinion or elsewhere, to ascertain whether such question was in fact decided.

The case is not in point, as the record in the case at bar does show that Federal questions were necessarily involved, raised and decided, and that no judgment or decree could be rendered without disposing of these questions.

To the same effect is Brown vs. Atwell, 92 U.S. 327.

In Romie *et al.* vs. Casanova, 91 U. S. 379, it was held that where both parties claimed under a common grantor whose title under the United States was admitted, and the controversy only extended to the rights which they had severally acquired under it, no Federal question arose.

This case is not in point. The city of San Jose owned the land in fee,—was the common grantor. Each party claimed to have received a grant of the land from the city, and the action was ejectment. No question arose as to the extent or validity of the city's title, as private owner, but it was a dispute between parties as to their personal rights and interests in the property under the city grant. A common case of conflict between parties more or less removed from the original source of title, and who did not question the action of the government or the validity of the conveyance by which the government conveyed the property to the city.

II.

The second ground of dismissal appears to have been abandoned. No defect or deficiency in the record is pointed out and none is believed to exist. The clerk's certificate shows that the whole record is here and that must be taken as conclusive. We suppose it to be the correct practice, where diminution of the record is claimed, for the party raising the point to distinctly specify in his motion papers wherein the record is incomplete. He will not be allowed to throw out a general suggestion and leave counsel and court to wade through the record to discover the omissions for themselves.

But further, where omissions do exist and the court can see that they are material, the cause will not be dismissed on that ground in the first instance. The court will generally, if not universally, fix some time within which the record shall be made complete, or dismissal will follow.

We claim here that the record is just what was before the State court, and discloses everything necessary to show what that court decided, and what this court is called upon to review.

We claim further that the motion to dismiss on this ground, is dilatory in its character, the day fixed for hearing being probably beyond the time when the case will be reached in its order for argument, and should not be entertained by the court.

If, however, the case should not be reached for hearing before the day named for the hearing of the motion, and the first ground of motion should fail as we insist it must, and the counsel should convince the court that the complete ~~roud~~ record is not filed as required by section 3, of rule 8, of this court, then we ask that proper time be given to make said record complete, according to the practice usual in such cases.

E. C. PALMER,
of Counsel for Plaintiff in Error.

112-720

Office Supreme Court U. S.
FILED
NOV 17 1884
JAMES H. McKENNEY,
CLERK

SUPREME COURT, UNITED STATES.

October Term, 1884.

No. 139.

THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY, *et al.*, *Plaintiffs in Error*,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY.

Motion by Defendant in Error to Dismiss, &c.

THOMAS WILSON,
Of Counsel for Defendant in Error.

Jones & Kroeger, Printers, Winona.

SUPREME COURT, UNITED STATES.

October Term, 1884.

No. 139.

THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY, *et al., Plaintiffs in Error,*

vs.

THE WINONA & ST. PETER RAILROAD COMPANY.

Sir—Please take notice that the defendant in error in the above entitled suit will move the Court on the eighth day of December, A. D. 1884, at the opening of court on that day, or as soon thereafter as this motion shall be reached in its order, to dismiss the writ of error herein on the ground (1) that there is no question of federal cognizance in the case, and (2), that the plaintiff in error has failed to have returned to the court and filed therein a complete record as required by section 3 of rule 8 of this court.

Winona, October 25th, 1884.

THOMAS WILSON,
Of Counsel for Defendant in Error.

To

HON. E. C. PALMER,
Of Counsel for Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON THIS MOTION.

The United States by an act of Congress approved March 3d, 1857, granted to the Territory of Minnesota lands (viz: every alternate section, designated by odd numbers, for six sections in width on each side of each of the roads and branches) to aid in the building of certain lines of railroad—among others:

(1) A line

> "from St. Paul and from St. Anthony via Minneapolis to a convenient point of junction west of the Mississippi to the southern boundary of the Territory in the direction of the mouth of the Big Sioux River."

And (2) A line

> "from Winona via St. Peter to a point on the Big Sioux River south of the 45th parallel of north latitude."

The Territory, by an act approved July 22, 1857, (Special Laws 1857, Chapter 1, page 18,) authorized the Root River Valley and the Southern Minnesota Railway Company to build one of the lines in aid of which such land grant was made, and the Transit Railroad Company to build another of such lines. Sections 2 and 3 of sub-chapter three of said act are in the following language, viz:

> "Section 2. The said Root River Valley and Southern Minnesota Railroad Company are hereby authorized and empowered to survey, locate, construct, complete, and perpetually to have, use, maintain and operate a railroad, with one or more tracks or lines from St. Paul and St. Anthony, via Minneapolis, to a point of junction at Shakopee City, in the county of Scott, and thence via Belle Plaine, Clarksville, LeSueur, Traverse de Sioux, St. Peter, Kasota, Mankato and South Bend to the southern boundary of the Territory of Minnesota in the direction of the mouth of the Big Sioux River, and for these purposes shall have, possess, exercise and enjoy the same rights, privileges and immunities with reference to the said routes, or any route of railroad in this act provided for, or any railroad to be built thereon, as it now possesses and enjoys, with reference to the roads described in the act of incorporation of said company, and the amendments thereto.
>
> Section 3. All the lands, interest, rights, powers and privileges granted to and conferred upon the Territory of Minnesota in and by virtue of an act of Congress, approved March 3, 1857, entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections to aid in the construction of certain railroads in

said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State,' applicable to the said roads or lines above mentioned, are hereby disposed of and conferred to and upon the said Root River Valley and Southern Minnesota Railroad Company, subject to the provisions hereinafter set forth and the provisions of the act of Congress aforesaid."

Section 1, (so far as pertains to the question here involved,) and section 2, of sub-chapter two of said act, are in the following language:

"Section 1. The Transit Railroad Company is hereby authorized and empowered to survey, locate, construct, complete and perpetually to have, use, maintain, and operate the Transit Railroad with one or more tracks or lines from the city of Winona, on the most direct and feasible route, by way of St. Peter, to the Big Sioux River, south of the forty-fifth parallel of north latitude. *

* * * * * *

Section 2. For the purpose of aiding in the construction of the railroad which by this act the Transit Railroad Company is authorized to construct, all the interest and estate, present and prospective, of this Territory and future State, in or to any and all the lands granted by the Government of the United States to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from Winona via St. Peter to the Big Sioux river south of the forty-fifth parallel of north latitude, by virtue of an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State,'. approved March 3d, 1857, together with all and singular the rights, privileges and immunities conferred, or intended to be conferred upon said road by the said act of Congress, are hereby granted to and vested in the said Transit Railroad Company; *Provided*, that the said lands shall be exclusively applied to and used by said Transit Railroad Company in the construction of a railroad from Winona via St. Peter to a point on the Big Sioux river south of the forty-fifth parallel of north latitude, and shall be disposed of only in the manner prescribed in said act of Congress, approved March 3d, 1857, and shall be applied to no other purpose whatsoever."

Subsequently and prior to the year 1860, each of said railroad companies, in order to obtain State aid, mortgaged to the State all its lands, franchises and property, as security for the performance of the conditions on which the aid was granted; and afterwards default having been made, the State foreclosed the mortgage and bid in and acquired all the "lands, property, franchises," &c., of each. The foregoing transactions were prior to 1862. By an act approved March 10th, 1862, (Special Laws, Chapter 19th, page 243) it was provided and enacted.

"Section 1. That all the rights, benefits, privileges, property, franchises and interests of the Transit Railroad Company acquired by the State of Minnesota, by virtue of any acts, deeds, agreements or things by the said State or Company heretofore done or suffered by virtue of any laws of the State or former Territory of Minnesota, or by reason of the sale of said road or any part thereof by the Governor of said State, or by reason of any provisions of the constitution of said State, be, and the same are hereby granted to William Lamb (and others) for the purpose and on the terms and conditions hereafter in this act provided, free and clear of all claims and liens thereon, and free and discharged from all claims of the State of Minnesota against the same except as hereinafter provided. And the said persons, by the name and style of the Winona and St. Peter Railroad Company are hereby invested with the right to enter upon, use and enjoy all and singular, the road, property, franchises and immunities heretofore possessed by or granted to the Transit Railroad Company, * * and all the corporate rights and franchises of said Transit Railroad Company are hereby vested in and continued to the said William Lamb (and others) their associates, successors and assigns, by the name and style of the Winona and St. Peter Railroad Company."

It is farther provided in said act that the persons named should constitute a board of directors and should organize, &c.

They did organize, and the corporation so created is this defendant in error.

By an act approved March 4, 1864, the State of Minnesota enacted:

Section 1. That all the rights, benefits, privileges, property, franchise and interest of the Southern Minnesota Railroad Company, acquired by the State of Minnesota by virtue of any acts, deeds, sale, foreclosure, agreement or thing, by the said Company heretofore done or suffered, or by reason of any forfeiture, or by virtue of any law of the State, or any foreclosure by the Governor of the State, acting for and in behalf of the State, or by reason of any sale of the same or any part thereof by the Governor of the State of Minnesota, and bid in and purchased by the Governor of the State of Minnesota for the benefit of the State of Minnesota, pertaining to the line of road from St. Paul and from St. Anthony via Minneapolis to a point of junction at Shakopee City * * to the southern boundary of the Territory in the direction of the

Big Siuox River; and all the lands, interests, rights, powers and privileges granted to and conferred upon the Territory of Minnesota, in and by virtue of an act of Congress, approved March 3d, A. D. 1857, pertaining to said line of road * * are hereby granted to and vested in and transferred as follows, to-wit: All the rights, immunities, benefits, privileges, franchises, lands, interests and property aforesaid, appertaining, relating, or applicable to that portion of said line of road last aforesaid, to Horace Thompson (and others), their associates and successors * * which said persons, their associates and successors, shall be known by the name of the Minnesota Valley Railroad Company, and by that name may sue and be sued," &c.

The persons named were authorized to organize and become a corporation by the name aforesaid, and they did so organize, and the corporation so created is (under another name) this plaintiff in error. By said act it was farther provided:

"Section 8. And be it farther enacted, That if at any time the Congress of the United States should grant aid in lands or otherwise, to aid in the construction of the railroad provided for in this chapter, all such lands or aid so granted to the State are hereby pledged and granted to, and shall become vested in the aforesaid Minnesota Valley Railroad Company."

See Record, pages 83 to 90.

By an act of Congress approved March 12, 1864, (13 United States Stat. at Large, 72, 74) there were granted to the State of Minnesata to aid in the building of the line of road of plaintiff in error, "four additional sections of land per mile to be selected," &c.

By an act of Congress approved March 3d, 1865, (13 United States Stat. Large, 526) the grant of lands made to Minnesota by the act of Congress of March 3d, 1857, was increased to ten sections per mile. It was found and decided by the State Court, and must here be assumed to be true, that

"*within the time and in the manner specified and required by the laws of the United States, and by the State and Territory of Minnesota, the plaintiff (this defendant in error) surveyed, located, constructed and completed a line of railroad from Winona in the most direct and feasible route by way of St. Peter, to the Big Sioux River, south of the 45th parallel of north latitude, and in all respects conformed to and complied with the several acts of the Ter-*

ritory and State as to the building of said railroad and the provisions, conditions and requirements of the several acts of Congress granting lands to aid in the building of such roads."

Record, page 90.

The finding as to the construction of the line of plaintiff in error as far as to St. James (Range 32) is substantially in the same terms.

Record, page 93.

It is also found and decided by the Court below as a fact

"that before the line of road of either the Winona & St. Peter Railroad Company or of the St. Paul and Sioux City Railroad Company was definitely located or fixed to any point between the western line of Range 31 and the western line of Range 40, the right of pre-emption had attached to, and the United States had sold and disposed of so many of the lands lying within twenty miles of each of said roads, that the remaining alternate sections within twenty miles of either were insufficient to make up the number of acres to which either road was or is entitled under the laws of the United States or of Minnesota, on account of the building of its road to said western line of Range 40, and all of the lands in controversy would not make up such deficiency to either road."

Record, page 112.

Thus it will be observed the record shows that the State had title to these lands and conveyed them to one or the other of these parties—the sole question being to which party. That is not a federal question. Nor is there anything in the record to show that the decision of any federal question was necessary to the determination of this cause. Hence the judgment of the State Courts is final.

Murdock vs. City of Memphis, 20 Wal. 590.
Carpenter vs. Williams, 9 Wal. 785.
Bowie vs. Caseneva 91 U. S. 379.
Brown vs. Atwell, 92 U. S. 329.
Rector vs. Ashley, 6 Wal. 147.
Gibson vs. Chouteau, 8 Wal. 314.
Moore vs. Mississippi, 21 Wal. 636.

THOMAS WILSON,
Of Counsel for Def't in Error.

112-720

NOV 24 1884
JAMES H. [illegible]

SUPREME COURT, UNITED STATES.

October Term, 1884.

No. 139.

THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY, *et al., Plaintiffs in Error,*

vs.

THE WINONA & ST. PETER RAILROAD COMPANY.

Brief of Defendant in Error.

THOMAS WILSON,
Of Counsel for Defendant in Error.

Jones & Kroeger, Printers, Winona.

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vs.

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BRIEF OF DEFENDANT IN ERROR.

The United States by an act of Congress approved March 3d, 1857, granted to the Territory of Minnesota lands to aid in the building of certain lines of railroad:—among others:

(1) A line

"from St. Paul and from St. Anthony via Minneapolis to a convenient point of junction west of the Mississippi to the southern boundary of the Territory in the direction of the mouth of the Big Sioux River."

And (2) A line

"from Winona via St. Peter to a point on the Big Sioux River south of the 45th parallel of north latitude."

The Territory, by an act approved July 22, 1857, (Special Laws 1857, Chapter 1, page 18,) authorized the Root River Valley and the Southern Minnesota railway Company to build one of the lines in aid of which such land grant was made, and the Transit Railroad Company to build another of such lines. Sections 2 and 3 of sub-chapter three of said act are in the following language, viz:

"Section 2. The said Root River Valley and Southern Minnesota Railroad Company are hereby authorized and empowered to survey, locate, construct, complete, and perpetually to have, use, maintain and operate a railroad, with one or more tracks or lines from St. Paul and St. Anthony, via Minneapolis, to a point of junction at Shakopee City, in the county of Scott, and thence via Belle Plaine, Clarksville, LeSueur, Traverse de Sioux, St. Peter, Kasota, Mankato and South Bend to the southern boundary of the Territory of Minnesota in the direction of the mouth of the Big Sioux River, and for these purposes shall have, possess, exercise and enjoy the same rights, privileges and immunities with reference to the said routes, or any route of railroad in this act provided for, or any railroad to be built thereon, as it now possesses and enjoys, with reference to the roads described in the act of incorporation of said company, and the amendments thereto.

Section 3. All the lands, interest, rights, powers and privileges granted to and conferred upon the Territory of Minnesota in and by virtue of an act of Congress, approved March 3, 1857, entitled, 'An act making a grant of land to the Territory of Minnesota, in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State,' applicable to the said roads or lines above mentioned, are hereby disposed of and conferred to and upon the said Root River Valley and Southern Minnesota Railroad Company, subject to the provisions hereinafter set forth and the provisions of the act of Congress aforesaid."

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* * * * *

"Section 2. For the purpose of aiding in the construction of the railroad which by this act the Transit Railroad Company is authorized to construct, all the interest and estate, present and prospective, of this Territory and future State, in or to any and all the lands granted by the Government of the United States to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from Winona via St. Peter to the Big Sioux river south of the forty-fifth parallel of north latitude, by virtue of an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State,' approved March 3d, 1857, together with all and singular the rights, privileges and immunities conferred, or intended to be conferred upon said road by the said act of Congress, are hereby granted to and vested in the said Transit Railroad Company; *Provided*, that the said lands shall be exclusively applied to and used by said Transit Railroad Company in the construction of a railroad from Winona via St. Peter to a point on the Big Sioux river south of the forty-fifth parallel of north latitude, and shall be disposed of only in the manner prescribed in said act of Congress, approved March 3d, 1857, and shall be applied to no other purpose whatsoever."

Subsequently and prior to the year 1860, each of said railroad companies, in order to obtain State aid, mortgaged to the State all its lands, franchises and property, as security for the performance of the conditions on which the aid was granted; and afterward default having been made, the State foreclosed the mortgage and bid in and acquired all the "lands, property, franchises," &c., of each. The foregoing transactions were prior to 1862. By an act approved March 10, 1862, (Special Laws, Chapter 19th, page 243) it was provided and enacted.

"Section 1. That all the rights, benefits, privileges, property, franchises and interests of the Transit Railroad Company acquired by the State of Minnesota, by virtue of any acts, deeds, agreements or things by the said State or Company heretofore done or suffered by virtue of any laws of the State or former Territory of Minnesota, or by reason of the sale of said road or any part thereof by the Governor of said State, or by reason of any provision of the constitution of said State, be, and the same are hereby granted to William Lamb (and others) for the purpose and on the terms and conditions hereafter in this act provided, free and clear of all claims and liens thereon, and free and discharged from all claims of the State of Minnesota against the same except as hereinafter provided. And the said persons, by the name and style of the Winona and St. Peter Railroad Company are hereby invested with the right to enter upon, use and enjoy all and singular, the road, property, franchises and immunities heretofore possessed by or granted to the Transit Railroad Company, * * and all the corporate rights and franchises of said Transit Railroad Company are hereby vested in and continued to the said William Lamb (and others) their associates, successors and assigns, by the name and style of the Winona and St. Peter Railroad Company."

It is farther provided in said act that the persons named should constitute a board of directors and should organize, &c.

They did organize, and the corporation so created is this defendant in error.

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The persons named were authorized to organize and become a corporation by the name aforesaid, and they did so organize, and the corporation so created is (under another name) this plaintiff in error. By said act it was farther provided:

"Section 8. And be it farther enacted, That if at any time the Congress of the United States should grant aid in lands or otherwise, to aid in the construction of the railroad provided for in this chapter, all such lands or aid so granted to the State are hereby pledged and granted to, and shall become vested in the aforesaid Minnesota Valley Railroad Company."

See Record, pages 83 to 90.

The survey on the face of the earth for the purpose of locating the line of defendant in error, between the east line of Range 32 and the west line of Range 37 (the lands in question are west of Range 31) was made during the five days preceding the 10th day of April, 1864. On or before April 15th, 1864, a map showing this line of survey was deposited in the local land office of the

United States at St. Peter (in which district the lands covered by the survey were) and was on the 15th day of April, 1864, forwarded to the General Land Office at Washington by the Register of said Land Office at St. Peter. On the 28th day of April, 1864, it was returned from the General Land Office to the St. Peter office, that the certificate of the Governor of the State and the dates of the field work from point to point might be added, and with the further requirement that it should be forwarded by the Governor of the State to the Department of the Interior. Such requirements having been complied with, the map was forwarded to the Department of the Interior by the Governor, and was received at the General Land Office on the 3d day of August, 1864, with a request that the lands within the proper limits should be withdrawn from market, which request was complied with on the 10th day of August, 1864.

Record, pages 80, 81, 90.

And on the 10th day of July, 1865, the lands within 10 and 20 miles of the road were withdrawn from Rochester (50 miles west of Winona) to the west line of township (Range) 38.

Record, page 91.

In November, 1866, the line of location of defendant in error was surveyed and staked on the field from the west line of Range 37 to and beyond the west line of Range 40; but as the Government surveys had not been made farther west than the east side of Range 39, the survey was only accepted as a definite location of the road to that point. But so soon as the Government surveys were extended, the location was extended to a point further west than any of the lands in controversy, and the limits were fixed and the lands withdrawn according to such limits. And the limits so fixed have ever since been recognized by the Interior Department of the United States and by the State.

Record, pages 90, 91, 92, 93, 117.

By the predecessor of the Southern Minnesota Railway Company, a preliminary survey was made of a line past these lands in

1857 and 1858, and from notes taken on the survey, and from notes of the United States Government surveys, duplicate maps were made and one forwarded to the General Land Office at Washington, and one filed with the Governor of the State. But this map or line was not, so far as appears, adopted or approved either by the Interior Department of the United States, or by the State officers or (until June 17, 1865,) by the railroad company.

See Record, pages 93, 94, 95, 43, 44, 81.

On the 17th day of June, 1865, the plaintiff in error, by a resolution of its Board of Directors, adopted this line and forwarded to the Department of the Interior a map thereof, and asked that it be adopted as the location of its line of road, "at the dates indi-"cated thereon."

Record, pages 95-6.

This the Interior Department refused, but accepted the map "as the basis of adjustment of the land grant," the order accepting it to take effect "*from and after its reception*" at the local land office.

Record, page 82.

Prior to this time there has been a temporary and provisional withdrawal of a belt of lands about twenty miles in width along where it was supposed the line of plaintiff in error might be.

Record, pages 43, 44, 45, 81, 114, 115.

But this suspension or withdrawal as has been said was merely provisional and "*was not made for the purpose of indicating that the lands so suspended or withdrawn, were the lands to which the State was entitled under the grants of 1857 and 1864, on account of this line of road.*"

Record, page 116.

By an act of Congress, approved March 12, 1864, (13 United States Stat. at Large, 72, 74) there were granted to the State of

Minnesota, to aid in the building of the line of road of plaintiff in error, four additional sections of land per mile. By an act of the Legislature, approved March 2d, 1865, (Chapter 15 General Laws) the State of Minnesota accepted the grant made by the act of Congress last above referred to. Section 1 of the act accepting said grant, is in the following words and figures:

> "Section 1. The lands, rights powers and privileges granted to and conferred upon the State of Minnesota in and by section seven of an act of Congress, approved March twelfth, eighteen hundred and sixty-four, entitled, 'An act for a grant of land to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State,' be and the same are hereby accepted upon the terms, conditions and restrictions therein prescribed, and the State of Minnesota assumes and undertakes the trust created in and by the said section."

By an act of Congress approved March 3d, 1865, (13 United States Stat. at Large, 526) the grant of lands made to Minnesota by the act of Congress of March 3d, 1857, was increased to ten sections per mile. So much of the acts of Congress above referred to as elucidate the questions involved in this case are printed in an appendix to this brief. It was found and decided by the State Court, and must here be assumed to be true, that "*within the time and in the manner specified and required by the laws of the United States, and by the State and Territory of Minnesota, the plaintiff* (*this defendant in error*) *surveyed, located, constructed and completed a line of railroad from Winona in the most direct and feasible route by way of St. Peter, to the Big Sioux River, south of the 45th parallel of north latitude, and in all respects conformed to and complied with the several acts of the Territory and State as to the building of said railroad and the provisions, conditions and requirements of the several acts of Congress granting lands to aid in the building of such roads.*"

Record, page 90.

The finding as to the construction of the line of plaintiff in error as far as the St. James (Range 32) is substantially in the same terms.

Record, page 93.

This defendant in error claims these lands under the act of Congress of March, 1857.

See Complaint, sub. 7, (Record pages 3 and 4,) sub. 11, 12, 13, (Record, page 5.)
Original or first findings of fact, Record, pages 84, 85, also Record, pages 88, 89, 109, 110.
Supplemental findings of fact, subdivision XVIII. XIX XX. (Record, pages 117, 118.) Also Record, pages 118, 119, 148. Stipulation B, Subdivision Second, Record pages 49, 50.

Plaintiff in error claims under the acts of Congress of March, 1857 and 1864, and (perhaps) 1865, aforesaid.

See Answer sub. 21, 22, 26, 32, 37. (Record, pages 19, 21, 24, 25.) Also those parts of findings of fact last above referred to; also, Record, page 148.

There is no fact found, nor any evidence in the case tending to show that the plaintiff in error could under any theory or by any possibility be entitled to any of these lands under the act of Congress of March 3d, 1857, aforesaid. The question simply is whether plaintiff in error is entitled to them under the act of 1864, and (perhaps) 1865, or defendant in error under act of 1857. It is found and decided by the Court below as a fact

> "That before the line of road of either the Winona & St. Peter Railroad Company or of the St. Paul & Sioux City Railroad Company was definitely located or fixed to any point between the western line of Range 31 and the western line of Range 40, the right of pre-emption had attached to, and the United States had sold and disposed of so many of the lands lying within twenty miles of each of said roads, that the remaining alternate sections within twenty miles of either were insufficient to make up the number of acres to which either road was or is entitled under the laws of the United States or of Minnesota, on account of the building of its road to said western line of Range 40, and all of the lands in controversy would not make up such deficiency to either road."

Record, page 112.

Hence it follows that one or the other, or both of these parties are entitled to these lands—the plaintiff in error under the act of Congress of 1864 and 1865, or the defendant in error under the act of 1857. On account of the neglect of plaintiff in error to bring up a full record, it is difficult to present to the Court the questions involved in the case. The Court below referred to the schedules attached to the complaint in order to describe the lands lying within certain limits. Those schedules are not found in the record in this Court.

It also refers in the bill of exception, to certain maps and exhibits which would throw very much light on the question presented. The most important of those maps and exhibits are wanting also.

See Record, page 78.

The Court below has found that the map attached to the complaint correctly indicates the lines of location and construction of each road, (See Record, pages 6, 7, 9, 10, 99, 119,) and as the lands are all described by sections, towns and ranges, a reference to that map shows their location with reference to the lines of each road. The map shows, and the Court has found and decided as a matter of fact that all the lands east of Range 39, (except N. half of N. W. ¼, sec. 17, and S. E. ¼ of S. W. ¼, and N. W. ¼, and S. half of N. E. ¼ of sec. 7, Town 107, Range 38, and S. half of S. E. ¼, and S. half of S. W. ¼ section 3, Town 107, Range 35) are within the six mile or granted limits of the defendant in error, and all the lands in controversy are outside of the granted limits of plaintiff in error. All outside of the granted or 6 mile limits of the defendant in error (except the S. half of S. half of Sec. 3, Town 107, Range 35) are more than 15 miles from either the located or constructed line of plaintiff in error.

(2) All those west of Range 38, which lie outside of the six mile or granted limits of the defendant in error, lie more than fifteen miles from the so-called located line of the plaintiff in error, and more than twenty miles from its line of road. All are within fifteen miles of road of defendant in error.

Record, pages 92, 99, 100, 118.

Before the commencement of this action, this defendant in error selected by way of indemnity, all the lands in controversy, which lie outside of its granted limits, and the plaintiff in error has not selected any of such lands.

Record, pages 103, 111.

Bearing in mind the following propositions established by the record: (1) That all the lands lie within either the six or fifteen mile limits of the defendant in error; (2) That it has selected for indemnity all of them that lie outside its of six mile or granted limits: (3) That it, within the time and in the manner specified and required by the laws of the United States and of the Territory and State of Minnesota, surveyed, located, constructed and completed, the line of road in aid of which the grant was made, and in all respects conformed to, and complied with the several acts of the Territory and State as to the building of said railroad, and the provisions, conditions and requirements of the several acts of Congress granting lands to aid in the building of such road, and (4) that all lands in controversy are required and insufficient to fill its grant --it follows that it is entitled to them, and in fact is the owner of all of them unless the claim of the plaintiff in error is precedent and paramount.

And the burden is on the plaintiff in error to show this. It is not sufficient to suggest doubts on the subject. It must show clearly its prior rights for, as said by the Lord Chancellor in Thornhill vs. Hall, 2 Clark and Fin. 36.

It is a rule "that admits of no exception in the construction of written instruments that where one interest is given, where one estate is conveyed, where one benefit is bestowed in one part of an instrument by terms upon which, if it stood alone no man breathing, be he lawyer, or be he layman, could entertain a doubt; in order to reverse that opinion to which the terms would of themselves and standing alone have led, it is not sufficient that you should deal in probabilities, but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away, either by *tacitum* or *dubium*, or by *possible*, or even by *probable*, but that it must be taken away and can only be taken by *expressum et certum*."

The Appellant too, having declined to bring up the evidence and having come into this Court on a bill of exceptions, must show necessarily that the law is in its favor. *All presumption not absolutely unreasonable are against the Appellant and in favor of the Respondent.*

But the facts found and decided by the trial court, to which reference has been made, show that the defendant in error has prior claims. Its grant was earlier. The lands all lie within the limits of its grant. It has in all respects complied with the law and earned the lands granted to aid its line. The lands were first withdrawn for it. It first selected those not covered or passed to its direct grant.

We think it may safely be affirmed that the rule, as to the adjustment of such grants is as follows:

1. *Priority is conceded to the earliest grant, where one is earlier than the other. If the grants are cotemporaneous, neither has precedence, but in such case they take the lands in the common limits, as tenants in common, an undivided moiety each.*

And this rule is not affected by the fact that one of the companies has located its line past the lands, ahead of the other.

2. *As between railroad companies claiming under a cotemporaneous grant, lands in place of the one cannot be legally taken for indemnity to the other.*

This last proposition is a mere consequence or corollary of the first. If the first, or both are admitted or established, we believe it is not even pretended that this appeal can be sustained. We therefore first, and particularly, call attention to these propositions.

(1) The rule enunciated in the first proposition is that which has (with the exception hereafter noted) been followed for about a quarter of a century, by the executive officers of the United States, whose duty it has been to administer such grants, and by the executive officers of the States to which such grants have been made.

See Record, pages 101, 102, 108.

Copps Land Laws, 366, Opinions Att'ys General Minnesota 452.

9 Opinions Att'ys Gen'l U. S. 254, 255.

This alone, for many different reasons should be conclusive as to the proper construction of such grants.

These rules and decisions have been made by many different Attorneys General, Secretaries and Commissioners, who were eminent lawyers. And they have been assented to and acquiesced in not only by the beneficiaries of such grants, and their counsel, whose interest and duty it was to detect and expose any error in such rulings, but by all having adverse interests, we shall not call attention to the decisions of such executive officers in support of the above legal proposition at great length, because it cannot be questioned, but that with the particular exception alluded to, the rulings and decisions have been uniformly for about a quarter of a century, as above stated. It is not extravagant to say that under and in pursuance of these rulings and decisions, millions of acres of land have been granted and transferred, and on the soundness and stability of such rulings depend the titles of hundreds of thousands of people. This would not be an exaggerated statement if its application was confined even to the State of Minnesota.

If these rulings and decisions are now to be reversed, then all of these titles are invalid—for it is well settled that any conveyance or certificate of such officers in violation of the acts of Congress are invalid, and pass no title.

Rev. Statutes U. S. page 451, Sec. 2449.

Polk's Lesses vs. Wendell, 9 Cranch 87 to 99.

Leavenworth, L. & G. R. Co. vs. U. S. 92 U. S. 739.

Dubuque & Pac. R. R. Co. vs. Litchfield, 23 How. 86, 89.

U. S. vs. Stone, 2 Wal. 535.

Schulenburgh vs. Harriman, 21 Wal. 59.

Farnsworth vs. M. & Pac. R. Co. 92 U. S. 65.

Cedar Rapid & Mo. R. Co. vs. Co. of Sac. 46 Iowa 245-6.

The disastrous consequences, therefore, of disregarding these well-settled rules, which have for so long been rules of property can hardly be overstated. Against such injustice the Courts have spoken with one voice. In the language of the Supreme Court of Minnesota, (Barton vs. Drake, 21 Minn. 303) "*such decisions are, and ought to be, absolutely final.*" Or as said by this Court:

> "This uniform action is as portential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."
>
> *United States vs. Burlington R. Co. 98 U. S. 341.*

This will always be the rule while Courts administer *justice.* It would be idle to further cite authorities to the effect that such decisions which have become rules of property, will not be questioned.

(2) The plaintiff in error having claimed the benefit of this rule while it was for its interest to do so and still holding as against defendant in error, lands to which it could have no claim or right if the position which it now takes is tenable.

Record, pages 102, 103.

It is now on familiar principles estopped to repudiate the rule which it before invoked and of which it has so long had the benefit, or to insist on a contrary rule as against the defendant in error who was induced to acquiesce in its previous claim.

2 Smith Lead Cases (7th Am. Ed.) 133, 134, 796-7, 741-2.
State Bank vs. N. W. Packet Co. 35 Iowa 226.
Preston vs. Jones, 9 Pa. St. R. 456.
City of Burlington vs. Gilbert, 31 Iowa 356, 364-7.
Daniels vs. Tierney, 102 U. S. 421.
Railway Co. vs. McCarty, 96 U. S. 258, 267-8.
Bur. R. Co. vs. Stewart, 39 Iowa 267.
2 Greenleaf's Evidence, Sec. 207.

(3) But it is said this is not a uniform rule, and that it has not been adhered to since a given date. The fact truly stated is that Columbus Delano as Secretary of the Interior, overruling the decisions of the Commissioner of the General Land Office and disregarding the unbroken current of authorities for a quarter of

a century did cease to adhere to the rule aforesaid, and in a few cases adopted a contrary rule.

Record of this Case, pages 101, 102, 108.
Copps Land Laws, 366.

But on his official demise, the few decisions aforesaid were reversed by his successor, and the well-settled prior rule became again the rule of the Department of the Interior, the Secretary having decided in a controversy between these very parties, as to this very land grant, that the rule enunciated by Secretary Delano in the exceptional cases referred to is not law.

(4) Not only is it true that the executive officers of the United States, and of the different States to which grants have been made, have for so long decided and held as aforesaid, but the highest and ablest courts of the country have also held the same doctrine.

C. M. & St. P. R R Co vs Sioux City R Co 16 Fed Rep 435

See decision of Mr. Justice Miller in McG. & M. Co. vs. S. C. & St. P. R. Co. not reported.
S. C. R. Co. vs. U. P. R. Co. 4 Dillon 307 and
M. K. & T. R. Co. vs. Kan. Pac. R. Co. 97 U. S. 491.

We may safely challenge the defendant's counsel to cite or refer to one (unreversed) decision of any respectable officer, judge or court, to the contrary. There is none such.

The last cited case deserves more than a casual notice. It covers and disposes of nearly every question raised in the case at bar; in that there had been, as in this, a contest between the claimants of the lands before the Secretary of the Interior and he had in that, as in this, decided against the respondent on the grounds that the appellant (M. K. & T. R. Co.) had first located its line of road past the lands.

Copps Land Laws, 366 et seq.

After the land had been certified to the State, for the appellant, the respondent commenced a suit in the Circuit Court of Kansas to settle its rights, and that Court held that on part of the route, at least, the M. K. & T. R. Co. (Appellant) was ahead in location,

(*See Record in this Court in that case, page 53,*)

and awarded the lands in controversy to the Appellant.

From that decision an appeal was taken to the Supreme Court of Kansas, and that Court decided that because prior to the location of the line of road of the Appellant, the Respondent had located its line, and had had the lands withdrawn in its favor, it (Respondent) was entitled to the lands. The latter Court seems to have conceded that the grant to the Appellant was ahead of that to the Respondent.

See Record in that case in this Court, page 66 et seq. ib. 69, 72 and 73.

On the appeal in this Court, Mr. Sears, attorney for Appellant, argued with great earnestness, that the Respondent deliberately created a voluntary conflict with the grant to his company; and therefore, it could not hold the lands against his company.

Sears Brief, pages 28, 29.

Every question, nearly, which is urged in this, was urged and decided in that—*against the Appellant there and here.*

It was there necessary for this Court either to answer *seriatim* all the positions of counsel, being as we have said, the identical positions here taken by the Appellant's counsel, or to give such a construction to the land grant acts as would show their immateriality. It did so, and to the decision we call attention as a most clear and conclusive answer to all the objections of the plaintiff in error in this case. This Court decided that the rights of the contesting companies are determined by the dates of their respective grants, and not by the dates of the location of the routes of their respective roads; that it is not within the language or purpose of such acts to except from their operation, any portion of the designated lands, for the purpose of aiding other roads; that the decision of the Secretary of the Interior, as to priority of location, is wholly immaterial and inconclusive.

We particularly call attention to the records, maps and briefs in that case, as they throw great light on the opinion, and show clearly what was in mind of the Court, and the questions which it intended to settle and did settle by the decision. The case in 4 Dillon above referred to, is directly in point against the Appellant's position, that priority of location gives priority of right. See also to same effect decision of Mr. Justice Miller,

(McGregor & Miss. R. Co. vs. S. C. & St. P. R. Co,)

in which he held and decided
"that neither the plaintiff corporation nor the defendant corporation could by any priority of location or construction entitle either of the corporations to anything more than the undivided half of said lands."

These are decisions directly and in so many words against the claim of this Appellant on the very questions involved. See to same effect,

Chicago, M. & St. P. R. Co. vs. S. C. & St. P. R. Co. 3 McCrary 280.

(5) The same conclusion and result necessarily follows from principles clearly established in numerous other cases, by this Court. If any question can be considered settled, it is now settled that acts of Congress, in the language of the act of March 3d, 1857, operate as a grant *in presenti.*

Schulenburgh vs. Harriman, 21 Wal. 60 and 62.
L. L. & G. R. Co. vs. U. S. 92 U. S. 739, 741-2, 748-9.
See dissenting opinion in same cases, 756-7.
9 *Opinion Att'y Gen'l. 254-5.*
French vs. Fyan, 93 U. S. 169, 170.
Newhall vs. Sanger, 92 U. S. 761-2-3.
Cent. Pac. R. Co. vs. Dyer, 1 Saw. 642, 651-2.
Mo. Kan. & T. R. Co. vs. Kan. Pac. R. Co. 97 U. S. 491.

If the land grant acts "vested a present title in the State" as held in the cases above cited, it would be a waste of words to attempt to demonstrate the self-evident proposition that priority of location could not as against other companies claiming under a contemporaneous grant, give priority of right.

The position being established that this was a grant *in presenti* passing an immediate interest to the State, as trustee of every alternate section of land for six sections in width on each side of the line of road—it is obvious, that "the rights of the contesting corporations to the disputed tracts, are determined by the dates of their respective grants, and not by the dates of the location of the routes of their respective roads." And as said by this Court, in the decision from whose language we have just quoted, "this construction * * will tend to prevent controversies between the grantees (in such land grants) and those claiming under them, respecting the title to lands covered by these several grants, and put an end to struggles to encroach upon the rights of others, by securing an earlier location."

> *Mo. K. & T. R. Co. vs. Kan. Pac. R. Co. 97 U. S. 497-8 and 501*

(6) It is well settled that such grants must be construed in the light of the general principles that Congress in the act of making these donations could not be supposed to exercise its liberality at the expense of pre-existing rights which, though imperfect, were still meritorious, and had just claims to legislative protection.

> *Broder vs. Water Co. 101 U. S. 276-7.*

Where there is a conflict between two titles derived from the same source, either of which would be good if the other were out of the way, the elder one must always prevail *prior in tempore potior est in jure.*

> *9 Opinion of Attorneys Genl. 254, 255. See also Leavenworth Railroad Co. vs. U. S. 92 U. S. 742.*

(7) According to no other rule or theory than that above stated is it possible to administer such grants.

Whether we take the conflicts as they in fact exist in the State of Minnesota between the several land grant roads, or such conflicts as would probably or necessarily occur in all such cases it would be utterly impracticable to administer the grants, on the theory that priority of location gives priority of rights:

See maps, showing times of roads, dates of location, &c.

(8) It would be against the policy of the act to allow priority of location to give priority of right. The grant to Minnesota was to a system of roads, with a view to develop the different localities of the State through which they were laid, and to secure different thoroughfares for commerce and for the use of the United States. The most casual reading of these facts shows that Congress intended to and did most carefully guard against and forbid the diversion of lands from the road in aid of which they were granted.

See Act of March 3, 1857, Sec. 1, 3.
Act of March 3, 1865, Sec. 1, 3, 5 and 6.
Act of July 13, 1866, Sec. 4.

It was not within the power of the State or its grantees to thwart the policy and expressed will of Congress.

Reference to a map of the State on which the lines of road are indicated, shows that if priority of location gives priority of right —the grant in aid of this defendant in error east of range 40 could have been nearly all diverted to other roads.

(9) The line of road of the plaintiff in error was not located past the lands in controversy ahead of the line of the defendant. The line of defendant in error between ranges 31 and 38 was located in April, 1864.

Record, pages 50, 80, 81, 90, 91.

And this location has ever since been recognized by all parties concerned, and by the officers of Minnesota and the Interior Department of the United States.

Record, pages 91, 92, 93, 117.

Under such circumstances no one can question the sufficiency of the steps taken to locate the line.

Schulenburgh vs. Harriman, 21 Wal. 61, 62.
Lesseur vs. Price, 12 How. 76-7.

It is not found by the trial Court, nor is it true in fact that the plaintiff in error ever located its road on the line on which the lands are claimed.

Record, pages 43, 44, 81, 93, 94, 95, 96.

Nor did any officer of the company ever claim that there was such location until about one year after the line of the defendant in error was located and its land limits fixed and the lands withdrawn for it. See pages of Record last above referred to. Exhibit 81, which is, or should be, a part of the bill of exceptions, (Record, pages 63, 78) shows this beyond any possible controversy. If for the argument it be conceded that after the adoption of the alleged line of defendant's road by it and by the Secretary of the Interior in 1865, we could not question the validity or fact of such location—yet such adoption is not retroactive as against previously acquired rights.

Flint & C. R. Co. vs. Gordon, 41 Mich. 420 and 431.

Nor did the Commissioner of the General Land Office intend or order that it should be retroactive.

Record, page 82.

SECONDLY.

In no view of the case would it be legal to take the granted lands of the defendant in error to make up deficiency to plaintiff.

(1) The grant is *in presenti*, transferring an immediate interest to the grantee in the lands covered by the direct grant, while the right to indemnity lands attached at the date of selection.

See Ryan vs. Railroad Co. 99 U. S. 382, 386, 388.
Patterson vs. Tatum, 3 Sawyer, 164, 166, 171.
Grinnell vs R. Co 103 U. S. 742.

Hence the right of the company within whose "granted" limits the lands lie, must be paramount.

(2) These lands were withdrawn for the defendant in error in April, 1864, long before the Congressional grant of May 12, 1864, (under which plaintiff in error claims) was accepted by the State of Minnesota.

(*Record, page 80, 81, 85, 90, 91, 117.*)

Again in 1865 (Record, page 91); whereas the plaintiff in error did not select or claim them until June 17, A. D. 1865. Nor did the State accept the grant until March, 1865.

Record, pages 85, 93, 94, 95, 96, 114, 115, 116, 43, 44, 45.

On this ground, too, the claim of defendant in error is prior both in time and right.

(3) The claim of plaintiff in error is under the act of 1864, or 1865, or both; whereas, the claim of defendant in error is under the act of 1857.

See this Brief, page 18.

"And the subsequent grants by Congress to the State for the use of the railroad could not have been intended to take away from the State the rights previously vested in it for other purposes. We are never to impute such intentions to the Legislative Department, when any other construction can be given to the words of a statute. Even if we could suppose that to be the meaning of Congress in this case, it would avail nothing to the latter grantee, since in all cases of conveyance a later grant must yield to an earlier. It has often happened that public grants by mistake have been so described in general words, that when they come to be located, they are found to lie afoul of each other. I believe it has never been thought that where this happens they are not to be treated like inconsistent deeds made by private persons."

9 Opinions of Att'ys Genl. 254.

(4) The general purpose of the Statute was to aid a *system* of roads and its express language is

"that the said lands hereby granted shall be subject to the future disposal of the Legislature, for the purpose herein expressed and no other, * * and shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted * * and the same shall be applied to no other purpose whatever."

In all such acts the remaining alternate sections are raised to double the minimum price, on the theory and supposition that the construction of the contemplated roads would enhance the value of the lands remaining to the United States to such an extent that the government would realize as much for the alternate sections as it would have realized if the grant had not been made.

Eldren vs. Sexton, 19 Wal. 196.

Under the act making the grant to Minnesota, (act of 1857, Sec. 1, the State or its grantees are allowed to select lieu lands in either the odd or even numbered sections. Therefore, if indemnity could be taken within the tiers of sections within six (or ten) miles of the line of road, the companies might, where the land limits overlap, take *all* the lands within those tiers, in disregard and violation of the policy of the grant and the spirit of the law. Such a course, too, would be opposed to the plain letter of the Statute, which only allows lieu lands to be selected "from the "lands of the United States, *nearest to the tiers of sections above specified.*"

There is, therefore, no warrant, whatever, in either the policy or language of the land grant acts, for the selection of lieu lands from the tiers of sections within six (or ten) miles of the lines of road.

Leavenworth, &c. Railroad Co. vs. U. S. 92 U. S. 749.

(5) The plaintiff in error having, while it was for its interest to do so, claimed as against this defendant that priority of location did not give priority of right, and now holding the benefits which it thus gained, (See Record, pages 102, 103,) is estopped to question that rule.

See authorities above cited on this point, Ante page 15.

THIRDLY.

These are the only questions in the case which this Court has a right, in any event, to review; as it is limited, in such cases, to the consideration of federal questions.

Murdock vs. City of Memphis, 20 Wallace, 590.

But the defendant in error contends that there is *no* question in the case within the cognizance of this Court. Both parties claim under the State, and both admit the title of the State and the question here is, which has acquired title from the State. That is a question, the decision of which by the State Courts is final.

See Complaint, sub-divisions 13, (Record, page 5,) 22, (Record, page 8,) 27, (Record, page 10.)
Carpenter vs. Williams, 9 Wal. 785.
Romie vs. Casaneva, 91 U. S. 379.
Brown vs. Atwell, 92 U. S. 329.
Rector vs. Ashley, 6 Wallace, 147.
Gibson vs. Chouteau, 8 Wallace, 314.
Moore vs. Mississippi, 21 Wal. 636.

It is clearly apparent that the case may have been decided without reference to any federal question.

See this Brief Ante pages 1 to 12 inclusive.

THOMAS WILSON,
of Counsel for Defendant in Error.

Acts of Congress Referred to in Foregoing Brief.

ACT. OF MARCH 3D, 1857, (11 U. S. STAT. AT LARGE 195.)

"Sec. 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:* That there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads, from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the Legislature of said Territory may determine—from St. Paul and from St. Anthony, via Minneapolis, to a convenient point of junction west of the Mississippi, to the southern boundary of the Territory, in the direction of the mouth of the Big Sioux River, with a branch via Faribault, to the north line of the State of Iowa, west of range sixteen; from Winona via St. Peter, to a point on the Big Sioux river, south of the forty-fifth parallel of north latitude; also from La Crescent via Target Lake, up the valley of Root river to a point of junction with the last mentioned roads, east of range seventeen, every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections or parts of sections, designated by odd numbers, as aforesiad, and appropriated as aforesaid shall be held by the Territory or future State of Minnesota, for the use and purpose aforesaid: *Provided*, That the land to be so located shall in no case be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches; *Provided further*, That the lands hereby granted for and on account of said roads and branches, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and that the same shall be applied to no other purpose whatsoever; *And provided further,* That any and all lands heretofore reserved to the United States, by any act of Congress or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any purpose whatsoever, be and the same are hereby reserved to the United States, from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

"Section 2. *And be it further enacted,* That the sections and parts of sections of land which by such grant shall remain to the United States within six miles on each side of said roads and branches shall not be sold for less than double the minimum price of the public lands when sold, nor shall any of said lands become subject to private entry until the same shall have been first offered at public sale at the increased price.

Section 3. *And be it further enacted,* That the said lands hereby granted to the said Territory or future State shall be subject to the future disposal of the legislature thereof for the purposes herein expressed, and no other; and the said railroads and branches shall be and remain public highways for the use of the Government of the United States, free of toll or other charge upon the transportation of any property or troops of the United States.

Section 4. *And be it further enacted,* That the lands hereby granted to said Territory or future State shall be disposed of by said Territory or future State only in the manner following, that is to say: That a quantity of land, not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches, may be sold; and when the Governor of said Territory or future State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted not to exceed one hundred and twenty sections for each of said roads and branches having twenty continuous miles completed as aforesaid; and included within a continuous length of twenty miles of each of such roads or branches may be sold; and so from time to time, until said roads and branches are completed; and if any of said roads or branches is not completed within ten years no further sale shall be made, and the lands unsold shall revert to the United States.

(C)

ACT OF MAY 12TH, 1864, (13 UNITED STATES STATUTES AT LARGE, 72, 74.)

"Section 7. That there be and is hereby granted to the State of Minnesota for the purpose of aiding in the construction of a railroad from St. Paul and St. Anthony, via Minneapolis, to a convenient point of junction west of the Mississippi, to the southern boundary of the State, in the direction of the mouth of the Big Sioux river, four additional alternate sections of land per mile, to be selected upon the same conditions, restrictions, and limitations, as are contained in the act of Congress entitled 'An act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama to aid in the construction of a certain railroad in said State, approved March third, eighteen hundred and fifty seven; *Provided,* That the land to be so located by virtue of this section may be selected within twenty miles of the line of said road, but in no case a greater distance therefrom."

(D)

ACT OF MARCH 3D, 1865, (13 U. S. STAT. AT LARGE, 536.)

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:* That the quantity of lands granted to the State of Minnesota, to aid in the construction of certain railroads in said State as indicated in the first section of an act entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State,' approved March 3d, eighteen hundred and fifty-seven, shall pe increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said acts and subsequent acts as hereinafter provided.

"*Section 2. And be it further enacted,* That the first proviso in the first section of the act aforesaid shall be so amended as to read as follows, to-wit: *Provided,* That the land to be so located shall in no case be further than twenty miles from the line of said roads and branches, to aid in the construction of each of which said grant is made; and said lands granted shall in all cases be indicated, by the Secretary of the Interior.

"*Section 3. And be it further enacted,* That any and all lands heretofore reserved to the United States by any act of Congress or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever be, and the same are hereby, reserved and excepted from the operations of this act, except so far as may be found necessary to locate the route of said roads through such reserved lands, in which case the right of way shall be granted subject to the approval of the President of the United States; *Provided further,* That any lands which may have been granted to the Territory or State of Minnesota, for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants shall be deducted from the full quantity of lands hereby granted, and that any lands which may have been so granted shall be strictly applied in accordance with the terms and conditions of said act or acts, unless subsequently modified by law.

"*Section 5. And be it further enacted,* That the lands hereby granted shall be subject to the disposal of the Legislature of the State of Minnesota, for the purposes aforesaid, and no other. And the said railroads and branches shall be and remain public highways for the use of the Government of the United States, free of all toll or other charges upon the transportation of any property or troops of the United States.

"*Section 6. And be it further enacted,* That the lands hereby granted to said Territory or State of Minnesota shall be disposed of by said State for the purposes aforesaid only and in the manner following, namely: When the Governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of said road is completed in a good, substantial and workmanlike manner as a first class railroad, and the said Secretary shall be satisfied that said State has complied in good faith with this requirement, the said Secretary of the Interior shall issue to the said State patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situated opposite to and within a limit of twenty miles of the line of said section of road thus completed, extending along the whole length of said completed section of ten miles of road and no farther. And when the Governor of said State shall certify to the Secretary of the Interior, and the Secretary shall be satisfied that another section of road, ten consecutive miles in extent, connecting with the preceding section, or with some other first-class railroad, which may be at the time in successful operation, is completed as aforesaid, the said Secretary of the Interior shall issue to the said State patents for all the lands granted situated opposite to and within the limit of twentymiles of the line of said completed section of road or roads,and extending the length of said section and no further, not exceeding ten sections of land per mile for all that part of said road thus completed under the provisions of this act and the act to which this is an amendment, and so from time to time, until said roads and branches are completed. And when the Governor of said State shall so certify, and the Secretary of the Interior shall be satisfied that the whole or any one of said roads and branches is completed in a good, substantial and workmanlike manner, as a first-class railroad, the said Secretary of the Interior shall issue to the said State, patents to all the remaining lands granted for and on account of said completed road and branches in this act, situated within the said limits of twenty miles from the line thereof, throughout the entire length of said road and branches: *Provided*, That no land shall be granted or conveyed to said State under the provisions of this act on account of the construction of any railroad or part thereof that has been constructed under the provisions of any other act at the date of the passage of this act, and adopted as a part of the line of railroad provided for in this act: *And provided*, That nothing herein contained shall interfere with any existing rights acquired under any law of Congress heretofore enacted making grants of land to the State of Minnesota, to aid in the construction of railroads: *And provided further*, That said lands, granted by this or prior acts, shall not in any manner be disposed of, except as the same are patented under the provisions of this act; and should the State fail to complete any one of said roads and branches within eight years after the passage of this act, then the said lands undisposed of as aforesaid granted on account of said road or branches, shall revert to the United States."